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# Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions

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# Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions

Bradford C. Mank\*

*Title VI prohibits federal agencies from providing funds to state or local agencies that discriminate. Environmental justice advocates have filed over fifty Title VI complaints with the EPA alleging that state or local environmental agencies have granted permits that will cause disparate impacts against minority groups. In February 1998, the EPA promulgated an Interim Guidance on Title VI to help the agency resolve these complaints. A wide range of state and local officials has criticized the Guidance because its vague definition of "disparate impact" may give the EPA too much discretion to find discrimination. This Article demonstrates, however, that the Guidance fails to provide sufficient protection for minority groups. First, EPA should place the burden on recipient agencies to demonstrate that no less discriminatory alternative exists that is comparably effective. Second, the recipient agency and permittee should have the burden of showing that any proposed mitigation measures will be effective. Third, the EPA or recipients should offer technical assistance, including grants, to community groups and complainants. Finally, EPA should encourage states to adopt procedures to promote early and effective participation by minority and other groups to avoid controversies that lead to Title VI complaints.*

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## I. INTRODUCTION: TITLE VI AND ENVIRONMENTAL JUSTICE

Title VI of the Civil Rights Act of 1964 forbids discrimination by programs receiving federal financial assistance.<sup>1</sup> Under section 602 of the statute, the Environmental Protection Agency (EPA) has promulgated regulations that prohibit recipients of agency funding from engaging in actions that cause disparate impacts.<sup>2</sup>

The growth of the environmental justice movement has led the EPA, environmentalists, state and local recipients, and industry to pay greater attention to Title VI. On February 11, 1994, President Clinton issued Executive Order 12,898, which requires federal agencies to develop environmental justice strategies.<sup>3</sup> Clinton simultaneously issued a presidential directive on environmental justice, which requires federal agencies that provide funding to recipients with programs affecting human health or the environment to guarantee that their grant recipients comply with Title VI.<sup>4</sup>

In February 1998, the EPA promulgated an Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Interim Guidance) to address when siting decisions may violate the statute.<sup>5</sup> While many commentators have criticized the Interim Guidance's definition of what constitutes a "disparate impact,"<sup>6</sup> much less attention has been devoted to other portions of the Interim Guidance. For instance, the Interim Guidance fails to clarify what is an "equally effective" less discriminatory alternative, or what types of mitigation can be used to justify an otherwise unacceptable project.<sup>7</sup>

This Article proposes several ways to improve the Interim Guidance's ability to protect minority groups. First, and most importantly, the burden should certainly be on the recipient agency to demonstrate that no less discriminatory alternatives exist that meet the

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1. See Civil Rights Act of 1964 §§ 601-605, 42 U.S.C. § 2000d (1997).

2. See *infra* notes 26-32 and accompanying text.

3. See Exec. Order 12,898, 3 C.F.R. 859-60 (1994), reprinted in 42 U.S.C. § 4321 (1997).

4. See Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994).

5. See ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (Feb. 5, 1998) (visited Nov. 21, 1998) <<http://es.epa.gov/oeca/oej/titlevi.html>> [hereinafter EPA, INTERIM GUIDANCE].

6. See Cheryl Hogue, *Environmental Justice: Comments on Title VI Guidance Seek Clearer Definitions, Input from More Parties*, Daily Env't L. Rep. (BNA), at B-1 (May 15, 1998) (reporting that public commentators have criticized the Interim Guidance for failing to define terms "disparate impact" or "mitigation"); David Mastio, *Green Monster*, 50 NAT'L REV., July 6, 1998, at 22 (arguing that the Interim Guidance fails to define terms "disparate impact" or "impacted community").

7. See EPA, INTERIM GUIDANCE, *supra* note 5, at 11-12.

applicant's reasonable business needs. The Interim Guidance's requirement that an alternative be "equally effective"<sup>8</sup> makes it too easy for a permitting agency and permittee to use minor advantages to prefer their proposal to a reasonably effective less discriminatory alternative. Second, the permitting agency and permittee should have the burden of establishing that any mitigation measures used to reduce disparate impacts to an acceptable level will in fact work and reduce any risks to surrounding populations, including minority groups protected by Title VI, to permissible levels. Moreover, the permitting agency and permittee should have the burden of examining whether such mitigation measures could themselves be used as less discriminatory alternatives that meet the applicant's reasonable business needs. Third, the EPA or recipients should offer technical assistance to Title VI complainants and should also provide Technical Assistance Grants (TAGs), so that complainants can hire their own technical experts. Fourth, recipients should adopt procedures to encourage early participation by affected populations, especially minority groups, to avoid controversies that lead to Title VI challenges. These amendments should protect minority and low-income populations, while allowing state or local permitting agencies and permit applicants a reasonable opportunity to site needed facilities.

Part II examines whether minorities are disproportionately affected by pollution and briefly discusses the EPA's response to environmental justice issues. Part III provides an introduction to Title VI, the EPA's section 602 regulations and the EPA's efforts to enforce Title VI. Part IV discusses the burden of proof under existing Title VI and VII law. Part V reviews the Interim Guidance, and proposes four significant ways to improve it.

## II. THE PROBLEM OF "ENVIRONMENTAL JUSTICE"

### A. *Empirical Evidence*

Several studies provide evidence that minority and low-income groups are exposed to disproportionate environmental risks.<sup>9</sup> While

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8. *See id.*

9. *See* COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) (involving the location of all 415 commercial hazardous waste facilities in the contiguous United States that could be identified through the EPA's Hazardous Waste Data Management System, using zip code areas to define minority and nonminority areas, and concluding that "[a]lthough socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant"); BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED: AN UPDATE OF THE 1987 REPORT ON THE

it may be understandable that developers would locate polluting facilities in areas where land is inexpensive and, consequently, where poor people are more likely to live, environmental justice has become a contentious political issue because studies show that such undesirable land uses are more likely to be located in areas with higher minority populations, even if the study controls for income levels. Some studies, however, have found no statistically significant difference in the percentage of minority populations living in areas with commercial hazardous waste facilities.<sup>10</sup> It is difficult to decide

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RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1994) (relying on zip code areas to find that the location of hazardous waste facilities reflects a national pattern of racial inequality that has gotten worse during the past decade); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9, 19-27, 33-34 (1997) (examining 544 communities, using 1990 census data, that hosted active commercial hazardous waste treatment storage and disposal facilities and finding no substantial evidence that commercial hazardous waste facilities that began operating between 1970 and 1990 were sited in areas that had disproportionate African-American or low-income populations, but finding evidence that Hispanics were disproportionately more likely to live near such facilities); J. Tom Boer et al., *Is There Environmental Racism? The Demographics of Hazardous Waste in Los Angeles County*, 78 SOC. SCI. Q. 793 (1997) (finding that working class communities of color in industrial areas of Los Angeles are most affected by hazardous waste treatment storage and disposal facilities); Robert D. Bullard, *Solid Waste and the Black Houston Community*, 53 SOC. INQUIRY 273, 279-83 (1983) (finding that although African-Americans made up only 28% of the Houston population in 1980, 6 of Houston's 8 incinerators and mini-incinerators and 15 of 17 landfills were located in predominantly African-American neighborhoods); Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 334-41 (1995) [hereinafter Mank, *Environmental Justice*] (summarizing studies finding that racial minorities and low-income persons live near pollution to a disproportionate extent); Evan J. Ringquist, *Equity and the Distribution of Environmental Risk: The Case of TRI Facilities*, 78 SOC. SCI. Q. 811 (1997) (finding that Toxic Release Inventory facilities and pollutants are concentrated in residential zip codes with large minority populations); see also U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) (examining racial and socioeconomic characteristics of the communities surrounding four offsite hazardous waste landfills located in the eight southeastern states that make up the EPA's region IV and finding that "[b]lack make up the majority of the population in three of the four communities where the landfills are located").

10. Studies finding no racial disparities are often based on census tract data as opposed to those based on zip code areas. See generally Andy B. Anderson et al., *Environmental Equity: Evaluating TSDS Siting Over the Past Two Decades*, WASTE AGE, July 1994, at 83 (reporting analysis based on 1990 census data); Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229 (1994) (reporting analysis based on 1980 census data); James T. Hamilton, *Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities*, 24 RAND J. ECON. 101, 117-18 (1993); Thomas Lambert & Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195, 203-04 (1997) (using data from 1970, 1980 and 1990 censuses, and finding no statistical relationship between active hazardous and solid waste storage facilities and incinerators and minority

which studies are more convincing, because they have employed different definitions of what constitutes an affected minority population.<sup>11</sup> For example, a study based on the percentage of minorities in the census tract surrounding a facility may come to a different result than one based on the percentage of minorities in the neighboring zip code areas, which are generally larger than census tracts.<sup>12</sup> On the whole, there is credible evidence that minority groups experience significant discrimination in some areas of the country.<sup>13</sup> At the very least, there is evidence that disproportionate siting of polluting facilities occurs in some areas and that nationwide policies are needed to prevent inequities in the future.<sup>14</sup>

### B. *The Political Debate*

There has been an active political debate about the social benefits of the environmental justice movement. Industry argues that the economic benefits of its projects far outweigh risks, which environmentalists frequently exaggerate.<sup>15</sup> Furthermore, industry suggests that the environmental justice movement may effectively discourage government officials from siting essential facilities that

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residents in St. Louis, but finding a weak relationship between minority and poor residents and facilities if inactive sites are added to the data set).

11. See generally Mank, *Environmental Justice*, *supra* note 9, at 329, 343 n.59, 390-92 & n.373 (discussing how use of different definitions of subpopulations or geographical areas can dramatically affect research results); Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 VA. ENVTL. L.J. 615 (1995) (same); Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 FORDHAM URB. L.J. 633, 665-69 (1994) (same); *infra* notes 127-128 and accompanying text.

12. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1401 n.73, 1402-03 & n.84 (1994) [hereinafter Been, *Market Dynamics*] (arguing that census tracts are more reliable means to define community than zip code areas); Been & Gupta, *supra* note 9, at 10-13 (citing sources and contending that census tracts are generally more reliable means to define community than zip code areas).

13. See Been & Gupta, *supra* note 9, at 9, 19-27, 33-34; Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 299-301 (1995).

14. See *supra* note 13.

15. See *Pollution in Minority and Inter-City Neighborhoods: Hearings Before the House Subcomm. on Oversight and Investigations*, 105th Cong., Aug. 6, 1998, available in 1998 WL 12763210 (recording testimony of Harry C. Alford, President/CEO, National Black Chamber of Commerce, criticizing the EPA's environmental justice policies for discouraging economic development in minority areas); CHRISTOPHER BOERNER & THOMAS LAMBERT, CENTER FOR THE STUDY OF AMERICAN BUSINESS, POLICY STUDY NO. 121, ENVIRONMENTAL JUSTICE? 6, 12-13 (1994) [hereinafter BOERNER & LAMBERT, ENVIRONMENTAL JUSTICE?]; *infra* note 118 and accompanying text.

would benefit minority and poor communities.<sup>16</sup> Environmentalists, however, argue that environmental justice policies are essential to protect the public health and environment of minority and low-income communities.<sup>17</sup>

### C. *The EPA's Response to Environmental Justice Issues*

In 1990, during the Bush Administration, the EPA took its first steps toward addressing environmental justice issues by creating an EPA Environmental Equity Work Group, which issued a report in 1992 encouraging the agency to conduct further studies in this area.<sup>18</sup> Later that year, the EPA established an Office of Environmental Equity (now the Office of Environmental Justice) to address these issues.<sup>19</sup>

Since 1993, the Clinton Administration has more aggressively tackled the problem of environmental justice. President Clinton's Executive Order 12,898 (Order) required all federal agencies to collect data about the health and environmental impact of their policies on minority groups and low-income populations and to develop policies to avoid adverse impacts on these groups.<sup>20</sup> The Order also mandated that every federal agency and department adopt environmental justice strategies by February 11, 1995.<sup>21</sup> The Order and these strategies are

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16. See BOERNER & LAMBERT, ENVIRONMENTAL JUSTICE?, *supra* note 15, at 6, 12-13 (1994); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 83-84, 105-08 (1996) (arguing that environmental justice policies may discourage economic development); Stephen C. Jones & Anoop G. Shroff, *Environmental Justice Concerns Delay Industrial Expansion*, 13 ENVTL. COMPLIANCE & LITIG. STRATEGY 1 (Oct. 1997) (same).

17. See Paul Stanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 607-09 (1997-98) (reporting proponents of environmental justice are concerned that brownfields redevelopment project will increase health risks without providing many jobs in minority communities); Mank, *Environmental Justice*, *supra* note 9, at 357-68 (arguing that risks of facilities may outweigh benefits); Samara F. Swanston, *An Environmental Justice Perspective on Superfund Reauthorization*, 9 ST. JOHN'S J. LEGAL COMMENT. 565, 572 (1994); Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 308-11 (1995).

18. See 1 ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA 230-R-92-008, REDUCING RISK FOR ALL COMMUNITIES 2 (1997).

19. See James H. Colopy, Comment, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 185-86 (1994).

20. See Exec. Order 12,898, § 1-103, 3 C.F.R. 859-60 (1994), *reprinted in* 42 U.S.C. § 4321 (1997).

21. See *id.* § 1-103(e). Federal Departments having final strategies for environmental justice include: Agriculture, Commerce, Defense, Energy, Interior, Justice, Labor, Transportation, Health and Human Resources, and Housing and Urban Development; NASA and the Nuclear Regulatory Commission (NRC) also employ environmental justice strategies. See Interagency Working Group on Environmental Justice: Notification of



not directly enforceable by private citizens through judicial action, but depend on the good faith of federal officials to follow them.<sup>22</sup> President Clinton's Presidential Directive on Environmental Justice, which accompanied the Order, emphasized that federal agencies should use *existing* law to enforce the Order's goals, especially by requiring their grant recipients to comply with Title VI.<sup>23</sup>

### III. TITLE VI

Because the EPA provides grants to almost all state and regional siting or permitting agencies, Title VI clearly applies to these agencies.<sup>24</sup> Before 1993, however, EPA did not actively enforce compliance with Title VI by its grant recipients.<sup>25</sup> In 1993, the EPA began a new policy of enforcing Title VI, and in 1994, the agency established an Office of Civil Rights to investigate Title VI complaints brought by private citizens against recipients.<sup>26</sup>

#### A. *Title VI Agencies May Prohibit Disparate Impacts*

Under section 601 of Title VI of the 1964 Civil Rights Act, federal agencies and departments may not provide funding to

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Availability of Final Federal Agency Environmental Justice Strategies, 60 Fed. Reg. 30,871 (1995).

22. See Bradford C. Mank, *Executive Order 12,898*, in ENVIRONMENTAL JUSTICE (Michael Gerrard ed.) (forthcoming 1999). Some federal administrative law judges, however, have concluded that their agencies are bound to follow the Order and the agency's environmental justice strategy. See *id.*

23. See Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994).

24. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 835-36 (1993) (reporting that in 1986 the federal government provided 46% of the funding for state air pollution programs, 33% of the funding for state water pollution programs, and 40% of the funding for state hazardous waste programs); Colopy, *supra* note 19, at 129, 154-55. Some local environmental agencies, however, are exempt from Title VI because they receive no federal funding. See Colopy, *supra* note 19, at 173.

25. See Fisher, *supra* note 13, at 313-14; Lazarus, *supra* note 24, at 836-38 (discussing the EPA's decision to deemphasize its civil rights responsibilities under Title VI); Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Citing Decisions*, 19 COLUM. J. ENVTL. L. 211, 228 (1994) (arguing that the EPA's stance that its decisionmaking was exempt from Title VI—"lacks support from any internal policy or legal precedent"); Colopy, *supra* note 19, at 180-88 (discussing history of the EPA's enforcement of its Title VI regulations from 1975 to 1993). During that time period, some federal agencies brought Title VI actions. See, e.g., *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6, 9 (1986).

26. See Natalie M. Hammer, Comment, *Title VI as a Means of Achieving Environmental Justice*, 16 N. ILL. U. L. REV. 693, 711 (1996). In 1997, the agency also added a new civil rights legal division within the agency's Office of General Counsel to focus exclusively on these issues. See ENVIRONMENTAL POLICY ALERT 31 (Dec. 31, 1997).

programs that discriminate on the basis of race.<sup>27</sup> The United States Supreme Court has required proof of intentional discrimination before allowing compensatory damages under section 601 of Title VI.<sup>28</sup>

Section 602 of the statute requires every federal agency or department to promulgate regulations that specify how the agency will determine whether grant applicants or recipients are engaging in racially discriminatory practices and also to provide a process for investigating and reviewing complaints of racial discrimination filed with the agency.<sup>29</sup> Beginning when the statute was enacted in 1964, almost all federal agencies have adopted Title VI regulations prohibiting disparate impact discrimination.<sup>30</sup> Courts have acknowledged the authority of agencies under section 602 of the statute to issue regulations forbidding recipients from engaging in actions causing disparate impact discrimination.<sup>31</sup>

The EPA's section 602 regulations forbid recipients from creating disparate impacts: "A recipient [of federal funds] shall not use criteria

27. See Civil Rights Act of 1964 §§ 601-605, 42 U.S.C. § 2000d (1997). Section 601 of the statute provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 601.

28. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 & n.2 (1983). Justices White and Marshall each maintained that showing disparate impacts was sufficient to prove a violation under section 601. See *id.* at 584 & n.2, 589-93 (White, J., announcing the judgment of the Court); *id.* at 615, 623 (Marshall, J., dissenting).

29. See § 602. The statute provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

*Id.*

30. See *Guardians*, 463 U.S. at 592 n.13; Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 939, 947-48 (1990) (discussing how presidential task force helped agencies develop similar disparate impact regulations under Title VI).

31. See, e.g., *Guardians*, 463 U.S. at 584 ("The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI ... and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, that the Court of Appeals erred in requiring proof of discriminatory intent."); see also *Alexander v. Choate*, 469 U.S. 287, 293 (1985) ("The [*Guardians*] Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."); *Lazarus*, *supra* note 24, at 835; *Colopy*, *supra* note 19, at 159-60.

or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin . . . ."<sup>32</sup> In addition, the agency's regulations proscribe recipients from choosing or approving a facility in an area where the plant will create discriminatory impacts that harm minority or ethnic groups covered by the statute.<sup>33</sup> Also, the EPA regulations direct state recipients to establish compliance programs designed to prevent discrimination by the state or any beneficiaries of grants issued by the state.<sup>34</sup> The Administrator of the EPA has authority under the regulations to refuse, delay or discontinue agency funding to any specific program or subprogram in which the agency has found discrimination. However, as shown in Part B, it is difficult for the agency to actually terminate funding.<sup>35</sup>

### *B. EPA's Investigation and Enforcement of Title VI Complaints*

Part III.B will briefly discuss the EPA's process for investigating Title VI complaints and sanctioning recipients that engage in discrimination. The main issue is that the EPA's Title VI regulations provide few rights for complainants, but many protections to recipients. Understanding this unequal treatment is crucial to grasping the arguments in Part V that recipients should generally bear the burden of proof, that either the EPA or recipients should provide technical assistance to complainants, and that recipients should establish programs to encourage early participation in permitting processes by a wide variety of groups, including minority and ethnic groups protected under Title VI.

It is relatively easy to file a Title VI complaint under EPA's section 602 regulations. A complainant may submit a short letter describing how a recipient is allegedly engaging in discriminatory practices.<sup>36</sup> Fulfilling the minimum requirements for a complaint,

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32. 40 C.F.R. § 7.35(b) (1997).

33. See *id.* (prohibiting location of facility that has discriminatory effect). Several other federal agencies have similar regulations forbidding siting or permitting actions by recipient agencies that cause disparate impact. See, e.g., 10 C.F.R. § 4.12(c) (1998) (Nuclear Regulatory Comm'n); 10 C.F.R. § 1040.13(d) (1998) (Dep't of Energy); 32 C.F.R. § 195.4(b)(1)(iii) (1997) (Dep't of Defense); 49 C.F.R. § 21.5(b)(3) (1997) (Sec'y of Transp.); 23 C.F.R. § 200.5(f) (1998) (Fed. Highway Admin.).

34. See 28 C.F.R. § 42.410 (1997).

35. See 40 C.F.R. § 7.130(b)(3)(iii), (4); see also 42 U.S.C. § 2000d-1.

36. See 40 C.F.R. § 7.120; Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 ENVTL. L. & LITIG. 309, 314-15, 319 (1994); Hammer, *supra* note 26, at 710-11. The EPA requires a complaint to be filed within 180 days of the last alleged discriminatory action, but complainants may request a waiver of the 180 day time limit for good cause. See

however, does not guarantee success. While legal or technical expertise is not needed to file a basic complaint, a complainant may need extensive technical assistance to understand complex demographic and pollution data that is often crucial in determining whether discrimination has occurred.<sup>37</sup>

Initially, the EPA conducts a preliminary investigation to determine whether the complaint states a valid claim.<sup>38</sup> If it accepts a complaint for investigation, the EPA conducts that investigation as the agency sees fit, although it may occasionally consult with the complainant as a courtesy.<sup>39</sup> There is no way for a complainant to force the agency to expedite its investigation or reach a decision.<sup>40</sup> If the Office of Civil Rights concludes that the recipient did not violate the agency's Title VI regulations, then the agency will dismiss the complaint.<sup>41</sup> It is almost impossible for a complainant to challenge the agency's dismissal of a complaint under either Title VI<sup>42</sup> or the Administrative Procedure Act (APA).<sup>43</sup>

A complainant's limited rights to participate in the agency's investigation and to appeal a dismissal are significant problems because the agency dismisses many Title VI complainants.<sup>44</sup> The EPA has never yet found a violation under Title VI against a recipient.<sup>45</sup>

On the other hand, recipients have substantial rights to challenge the agency's investigation and findings if the EPA finds a Title VI violation and seeks to impose sanctions, including termination of

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40 C.F.R. § 7.120(b)(2); *see also* EPA, INTERIM GUIDANCE, *supra* note 5, at 7-8 (explaining that the EPA might waive 180 day time limit for "good cause" if complaint was delayed because the complainants were exhausting the recipient's administrative remedies).

37. *See infra* Part V.

38. *See* 40 C.F.R. § 7.120(d)(1).

39. *See* Cannon v. University of Chicago, 441 U.S. 677, 706 n.41 (1979); Cole, *supra* note 36, at 321-23; Fisher, *supra* note 13, at 316; Colopy, *supra* note 19, at 167.

40. *See* Cole, *supra* note 36, at 321-22; Hammer, *supra* note 26, at 711.

41. *See* 40 C.F.R. § 7.120(g).

42. *See* Cannon, 441 U.S. at 715 (suggesting that Title VI generally does not allow private suits against the federal government); Fisher, *supra* note 13, at 317 n.158.

43. *See* Fisher, *supra* note 13, at 317 n.158; Colopy, *supra* note 19, at 168-69. A Title VI or APA suit against a federal agency might be permissible if the plaintiff charges the funding agency itself with discrimination, or with encouraging a recipient's discrimination. *See* Fisher, *supra* note 13, at 317 n.158.

44. *See* Paul Connolly, *Environmental Justice: Mayors Rap EPA at Meeting with Browner for Failure to Consult on Interim Guidance*, 29 Env't Rep. (BNA) 658 (July 24, 1998) (noting that as of July 1998, EPA had rejected a significant number of the complaints filed with the agency); Cheryl Hogue, *Environmental Justice: Permits Cited in Civil Rights Complaints Have Remained Valid, EPA Official Says*, 152 Daily Env't L. Rep. (BNA) Aug. 7, 1998, at A-9 (same) [hereinafter Hogue, *Permits Have Remained Valid*].

45. *See* Julie R. Domike & Arthur W. Ray, *EPA, Courts Focus on Title VI Issues in Locating Industrial Plants in Low-Income Areas*, NAT'L L.J., Dec. 1, 1997, at C1; Hogue, *Permits Have Remained Valid*, *supra* note 44, at A-9; Hammer, *supra* note 26, at 712-13.

funding. A recipient may appeal an adverse finding to an EPA administrative law judge (ALJ),<sup>46</sup> then the EPA Administrator,<sup>47</sup> and finally to an Article III federal court.<sup>48</sup> In addition, the EPA cannot discontinue funding to a recipient until thirty days after it sends a full report to Congress.<sup>49</sup> Because of these lengthy appeals processes, federal agencies rarely even attempt to terminate funding to a recipient that has engaged in discrimination, but simply require the recipient to avoid discriminatory practices in the future.<sup>50</sup> The EPA has never formally terminated funding to any recipient.<sup>51</sup>

The EPA's administrative process for investigating Title VI complainants and enforcing the statute provides little assistance to complainants and makes it difficult to punish recipients that engage in discrimination. The EPA should give complainants a greater opportunity to participate in investigations and the right to appeal dismissals at least to an agency administrative law judge.<sup>52</sup> Limited procedural reforms, however, would not redress the fundamental imbalance of resources between complainants, who are often poor, and the typical state agency, which generally has a significant professional staff and a fairly large budget, especially compared to community organizations. Part V proposes a more ambitious plan to provide complainants with a reasonable opportunity to investigate their claims and to place an appropriate burden on recipients to justify their actions.

#### IV. BURDEN OF PROOF UNDER TITLES VI AND VII

While section 601 of Title VI only reaches intentional discrimination, agency regulations under section 602, including the EPA's, address recipient practices that cause disparate impacts against protected minority groups.<sup>53</sup> This Article will focus solely on the standard for proving disparate impacts and will not address the somewhat different issues raised by disparate treatment suits involving intentional discrimination. No reported Title VI cases have addressed environmental justice challenges, but some Title VI decisions involving the siting of public facilities are helpful in understanding a plaintiff's burden of proof and what defenses a

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46. See 40 C.F.R. § 7.130(b)(2) (1997).

47. See *id.* § 7.130(b)(3).

48. See 42 U.S.C. § 2000d-2 (1997).

49. See *id.* § 2000d-1; 40 C.F.R. § 7.130(b)(3)(iii).

50. See Colopy, *supra* note 19, at 155.

51. See Domike & Ray, *supra* note 45, at C15.

52. Arguably, allowing a complainant to appeal dismissals to the Administrator of the EPA or to a federal court would be too costly.

53. See *supra* notes 29-30 and accompanying text.

defendant might raise.<sup>54</sup> Furthermore, employment discrimination cases provide some insights, but Title VII's restrictive evidentiary standards are often inappropriate for Title VI challenges involving recipients who have voluntarily accepted federal grants.<sup>55</sup> Part IV will focus on when a defendant may use business necessity to justify otherwise inappropriate disparate impacts, and when a plaintiff may demonstrate that a defendant failed to adopt a less discriminatory alternative.

#### A. *Establishing a Prima Facie Case of Disparate Impacts*

A plaintiff has the burden of pleading and proving a prima facie case.<sup>56</sup> A Title VII plaintiff must prove three elements in a prima facie case: (1) identify the specific employment practice that is being challenged, (2) show that the practice has a disproportionate impact on persons protected by the statute, and (3) demonstrate that the identified practice is the cause in fact of the alleged discrimination.<sup>57</sup> Title VI plaintiffs must prove the same second and third elements, but may not have to identify discriminatory practices with as much particularity as Title VII plaintiffs.

First, a civil rights plaintiff must, to the extent possible, identify which practices or actions of a defendant are the source of discriminatory effects. Title VII, as amended by the 1991 Civil Rights Act, specifies that a plaintiff must "demonstrate that *each particular* challenged employment practice causes a disparate impact," unless the plaintiff can establish "that the elements of a respondent's

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54. See, e.g., *NAACP v. Wilmington Med. Ctr., Inc.*, 657 F.2d 1322, 1334 (3d Cir. 1981) (en banc) (challenging hospital relocation in Title VI suit); *Bryan v. Koch*, 627 F.2d 612, 618-19 (2d Cir. 1980) (challenging the decision to close a municipal hospital in a Title VI action); *Bryant v. New Jersey Dep't of Transp.*, 998 F. Supp. 438 (D.N.J. 1998) (finding that plaintiffs had standing under Title VI, but not ruling on merits of claim that state highway department's location of highway was discrimination in violation of Title VI); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (challenging state highway department's location of highway in Title VI suit); *S. Watson*, *supra* note 30, at 966-71 (discussing Title VI suits challenging hospital closings and relocations).

55. See *infra* notes 146-147 and accompanying text.

56. See Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 422-23 (1998).

57. See *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601 (1st Cir. 1995); Mahoney, *supra* note 56, at 423, 459-63; Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 343 (1998).

decisionmaking process are not capable of separation for analysis.”<sup>58</sup> It is not clear whether or to what extent the particularity requirement applies to Title VI, but a plaintiff challenging a permitting agency’s siting criteria might have to identify which practices cause discrimination.<sup>59</sup>

Second, civil rights plaintiffs must establish disparity by showing that persons of a particular race, color, or national origin protected by the statute are disproportionately included or excluded compared to a relevant group.<sup>60</sup> The primary issue is usually whether a plaintiff has chosen an appropriate comparison group.<sup>61</sup> For instance, a Title VII plaintiff in an employment case must correlate the race of those holding a particular type of employment with the pool of qualified job applicants.<sup>62</sup> Similarly, a Title VI plaintiff challenging the location of a highway or hospital must compare the racial demographics of the site with appropriate alternative sites.<sup>63</sup> Courts in employment discrimination cases have sometimes rejected sophisticated statistical models if either the minority populations or comparison groups selected are under- or over-inclusive.<sup>64</sup>

Finally, to establish a *prima facie* case, a plaintiff must prove the identified practice actually caused the disparate impact.<sup>65</sup> In Title VII cases, courts usually require a plaintiff to prove causation through statistical evidence that a particular employment practice causes a “substantially” or “significantly” greater percentage of minorities to

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58. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (1997) (emphasis added); *see also* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (requiring plaintiff to show that specific employment practice has caused disparate impacts); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality opinion) (requiring plaintiff to “isolat[e] and identif[y] the specific” employment practices allegedly responsible for disparate impacts); Mahoney, *supra* note 56, at 423, 459-60.

59. See Vicki Been, *Environmental Justice and Equity Issues*, in 4 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 25D.04[3][g][i], at 89 n.89 (1997) [hereinafter *Been, Equity Issues*].

60. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406-07 (11th Cir. 1993); Mahoney, *supra* note 56, at 423, 460-61; Daniel K. Hampton, Note, *Title VI Challenges by Private Parties to the Location of Health Care Facilities: Toward a Just and Effective Action*, 37 B.C. L. REV. 517, 530 (1996); Lye, *supra* note 57, at 343.

61. See Mahoney, *supra* note 56, at 423, 461.

62. See *Wards Cove*, 490 U.S. at 650-51; Mahoney, *supra* note 56, at 423, 461; Lye, *supra* note 57, at 343.

63. See *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127-28 (S.D. Ohio 1984) (comparing racial demographics of highway site with other alternatives); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g][i], at 90-92.

64. See *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 750-52 (S.D. Fla. 1989); Lye, *supra* note 57, at 343-44 & n.148 (citing cases).

65. See *Elston*, 997 F.2d at 1407; Mahoney, *supra* note 56, at 423, 462-63; Hampton, *supra* note 60, at 530; Lye, *supra* note 57, at 343.

experience adverse results than an appropriate comparison group.<sup>66</sup> Under Title VI, courts have also frequently inferred causation based on statistical comparisons between minority host sites and the racial demographics of neighborhoods that would have been suitable for the facility.<sup>67</sup>

It is uncertain how much evidence a Title VI plaintiff needs to establish that a recipient's decision to grant a permit to an industrial or disposal facility will cause disparate impacts. Defining the relevant affected population groups and comparison groups is more complicated in an environmental siting case. Depending on the facts in a particular case and type of pollution, the relevant population could be those living within one mile of a facility, or several miles from the site. There are even more complex problems in measuring the risks of carcinogenic and noncarcinogenic pollutants.<sup>68</sup>

### B. Defendant's Burden of Proof

After the plaintiff establishes a *prima facie* case, the defendant bears the burden of either rebutting the plaintiff's *prima facie* evidence or showing the challenged practice is justified by business or educational necessity.<sup>69</sup> Because courts are often relatively lenient in allowing a plaintiff to establish a *prima facie* case, defendants rarely rest their entire defense on disproving the plaintiff's evidence and almost always try to prove their actions are justified by business

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66. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-95 (1988) (plurality opinion); Mahoney, *supra* note 56, at 423, 462-63; see also Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g][i], at 89-90.

67. See, e.g., *Elston*, 997 F.2d at 1407 (discussing standard under Title VI for proving causation); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (basing *prima facie* case on evidence that racial composition of local defendant's classrooms differs from random distribution); *Larry P. v. Riles*, 793 F.2d 969, 982-83 (9th Cir. 1984) (basing *prima facie* case on evidence that percentage of African-American children in "educable mentally retarded" classes was higher than their percentage in school population as a whole); *Coalition of Concerned Citizens*, 608 F. Supp. at 127 (finding *prima facie* case where people of color represented between 50% and 90% of neighborhoods in which proposed highway would be located); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g][i], at 90-91; Terence J. Centner et al., *Environmental Justice and Toxic Releases: Establishing Evidence of Discriminatory Effect Based on Race and Not Income*, 3 WIS. ENVTL. L.J. 119, 139 (1996).

68. See generally Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 584-616 (1992) (arguing that comparative risk analysis has many limitations); Mank, *Environmental Justice*, *supra* note 9, at 394-97 (same).

69. See Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 394 (1996); Mahoney, *supra* note 56, at 424.



necessity.<sup>70</sup> It is sometimes possible, however, for a defendant to rebut a plaintiff's prima facie case.<sup>71</sup>

Before 1989, some Title VI and VII cases placed both the burdens of production and persuasion on defendants once a plaintiff established a prima facie case.<sup>72</sup> Other lower court decisions, however, held that after a plaintiff establishes a prima facie case, the burden of going forward shifts to the defendant, while the ultimate burden of persuasion remains with the plaintiff.<sup>73</sup> In 1989, the Supreme Court, in *Wards Cove Packing Co. v. Atonio*, endorsed the latter approach.<sup>74</sup>

In the 1991 Civil Rights Act, Congress rejected *Wards Cove*'s holding that the ultimate burden of persuasion always remains with the plaintiff, and placed both the burdens of production and persuasion on the defendant.<sup>75</sup> The 1991 Act explicitly amended Title VII to place the burden of persuasion on the defendant "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," unless the defendant has rebutted the plaintiff's prima facie case by "demonstrat[ing] that a specific employment practice does not cause the disparate impact."<sup>76</sup> The 1991 Act does not apply to Title VI, but several commentators have predicted that courts will place the burden of proof on Title VI defendants either to rebut the plaintiff's prima facie case or to justify their actions.<sup>77</sup>

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70. See Mahoney, *supra* note 56, at 424, 469-71.

71. See Elston, 997 F.2d at 1412-13.

72. See *Larry P.*, 793 F.2d at 982 n.9 (holding burden of persuasion shifts to defendant if plaintiff makes a prima facie showing of disparate impact); *Georgia State Conference*, 775 F.2d at 1417 (same); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g], at 87-88 n.85; Centner et al., *supra* note 67, at 138-40; Fisher, *supra* note 13, at 320-21.

73. See *NAACP v. Wilmington Med. Ctr., Inc.*, 657 F.2d 1322, 1333 (3d Cir. 1981) (en banc); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) (stating that, after defendant presents justification for actions, "[t]he ultimate burden of proving illegal discrimination remains with plaintiffs"); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g], at 87-88 n.85; Fisher, *supra* note 13, at 320-21.

74. 490 U.S. 642, 659-60 (1989); see Mahoney, *supra* note 56, at 452-53.

75. See Civil Rights Act of 1991, § 105(a) (codified as amended at 42 U.S.C. § 2000e-2(k) (1997)); *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 797 (8th Cir. 1993) (holding that 1991 Act places burden of persuasion regarding business necessity on defendant in Title VII case); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 & n.5 (11th Cir. 1993) (same); *Frazier v. Garrison Indep. Sch. Dist.*, 980 F.2d 1514, 1525 n.34 (5th Cir. 1993) (same); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g], at 87-88 n.85; Mahoney, *supra* note 56, at 454-55; Lye, *supra* note 57, at 348.

76. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(ii) (1997). The 1991 Act defines "demonstrate" to require a defendant to "meet[] the burdens of production and persuasion." § 2000e(m).

77. See Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n.14 (11th Cir. 1993); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g], at 87-88; Fisher, *supra* note 13, at 321; Paul K. Sonn, *Fighting Minority Underrepresentation in Publicly Funded Construction*

### C. Justifications Under Titles VI and VII

#### 1. How Essential Must a Justification be Under Title VII

In *Griggs v. Duke Power Co.*, a unanimous Supreme Court held that facially neutral educational requirements and testing practices that had significant disproportionate impacts on African-Americans violated Title VII unless the defendant could justify these practices by proving "business necessity" and a "manifest relationship" to its legitimate interests.<sup>78</sup> Subsequent cases are split as to how essential a challenged practice must be to a defendant's business. Some courts have required that a practice not only advance, but be essential to, a defendant's business.<sup>79</sup> Other decisions have interpreted *Griggs'* "manifest relationship" language merely to require a defendant to demonstrate that a practice significantly or substantially advances its legitimate goals.<sup>80</sup> In *Wards Cove*, the Supreme Court, albeit in dicta,

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*Projects After Croson: A Title VI Litigation Strategy*, 101 YALE L.J. 1577, 1596-97 (1992); Colopy, *supra* note 19, at 163-64. *But cf.* *Scelsa v. City Univ. of N.Y.*, 806 F. Supp. 1126, 1140 (S.D.N.Y. 1992) (finding, albeit in dicta, that burden of persuasion in Title VI cases remains at all times with plaintiff, but not referring to 1991 Act). Indeed, it could be argued that a broad disparate impact approach is more suitable for the public funding issues relevant to Title VI than to the private sphere of employment under Title VII. *See* *Watson*, *supra* note 30, at 971-75.

78. 401 U.S. 424, 431-32 (1971); *see also* *Grover*, *supra* note 69, at 389; Philip S. Runkel, Note, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity?*, 35 WM. & MARY L. REV. 1177, 1182-83 (1994) (observing that *Griggs* contains five different verbal formulations for how employer must justify disproportionate impacts under Title VII).

79. *See* *Nashville Gas Co. v. Satty*, 434 U.S. 136, 143 (1977) (noting that the defendant's business must "necessitate[]" the practice); *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977) (stating that defendant must prove that height and weight requirements are "essential" to job performance); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1041-42 (9th Cir. 1988) (stating that the practice must be compelling enough to override its discriminatory effects), *vacated as moot*, 490 U.S. 1016 (1989); *Craig v. Alabama State Univ.*, 804 F.2d 682, 689 (11th Cir. 1986) (stating that the practice must be essential to its objectives); *Williams v. Colorado Springs, Colo. Sch. Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) (same); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1168 (5th Cir. 1976) (same); *United States v. St. Louis-S.F. Ry. Co.*, 464 F.2d 301, 308 (8th Cir. 1972) (en banc) (stating that the defendant's practice must be "essential"); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); *see also* Mark S. Brodin, *Costs, Profits, and Equal Employment Opportunity*, 62 NOTRE DAME L. REV. 318, 343 (1987) (citing cases); *Grover*, *supra* note 69, at 389-90; Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 11-17, 25-28 & 49 nn.233-34 (1990) (discussing the law of "business necessity" and citing cases). *But cf.* Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1031 (1993) (arguing that the *Dothard* decision "did not require that the criterion be necessary for the business to survive or for the job to be done at all but rather that it be 'necessary' for the job to be done well").

80. *See* *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (referring with approval to the trial court's holding that the defendant's refusal to hire

stated that a challenged practice need not "be 'essential' or 'indispensable' to the employer's business for it to pass muster."<sup>81</sup> It is unclear whether the Court was endorsing prior case law following the lesser "manifest relationship" approach, or adopting an even more lenient approach.<sup>82</sup>

The 1991 Civil Rights Act clearly rejected *Wards Cove's* lighter burden on the employer to prove business necessity, but left many questions unanswered about how essential the defendant's justification must be.<sup>83</sup> The 1991 Act requires Title VII defendants "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."<sup>84</sup> An interpretive memorandum in the legislative history provides that "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*."<sup>85</sup> While explicitly repudiating *Wards Cove*, the 1991 Act failed to address the problem that the Supreme Court's decisions prior to that case were not consistent.<sup>86</sup>

The Civil Rights Act of 1991 does not clearly set out how necessary a practice must be or how the business necessity standard relates to the issue of whether the defendant could adopt a less

methadone users was justified because its goals "are significantly served by—even if they do not require—[that] rule"); *Gillespie v. Wisconsin*, 771 F.2d 1035, 1039-40 (7th Cir. 1985); *Contreras v. City of L.A.*, 656 F.2d 1267, 1280 (9th Cir. 1981); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981); see also *Grover*, *supra* note 69, at 390; *Perry*, *supra* note 79, at 11-24, 50-53.

81. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). The Court explained that "this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils." *Id.*

82. See *Perry*, *supra* note 79, at 23-24, 45-50; *Watson*, *supra* note 30, at 960-62.

83. See Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1997).

84. *Id.*; *Elston v. Talledega County Bd. of Educ.*, 997 F.2d 1394, 1407 n.14 (11th Cir. 1993); *Colopy*, *supra* note 19, at 163-64.

85. 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991) (citations omitted); see also 42 U.S.C. § 2000e-2(k)(1)(C) (1997) (providing that plaintiffs' opportunity to demonstrate that a defendant failed to adopt an alternative practice with less discriminatory effect "shall be in accordance with the law as it existed on June 4, 1989 [the day before *Wards Cove* was decided] with respect to the concept of 'alternative employment practice'"); *Been*, *Equity Issues*, *supra* note 59, § 25D.04[3][g][ii][B], at 97.

86. Compare *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (referring with approval to the trial court's holding that the defendant's refusal to hire methadone users was justified because its goals "are significantly served by—even if they do not require—[that] rule"), with *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977) (noting that the defendant must prove height and weight requirements are "necessary" to job performance). See also *Grover*, *supra* note 69, at 392-93; *Mahoney*, *supra* note 56, at 455-56.

discriminatory alternative.<sup>87</sup> Since 1991, federal courts have applied at least four different tests for determining the burden placed on defendants under the business necessity standard:<sup>88</sup> (1) compelling necessity,<sup>89</sup> (2) demonstrably necessary to meet an important business goal,<sup>90</sup> (3) reasonably necessary to meet an important business objective,<sup>91</sup> or (4) that the selection criteria bear a manifest relationship to the employment and serve legitimate business goals.<sup>92</sup>

One interpretation of the Civil Rights Act of 1991 is that it implicitly rejects some earlier decisions holding that *Griggs*' "manifest relationship" language merely requires a defendant to demonstrate that a practice significantly or substantially advances its legitimate goals, and thereby makes it more difficult for defendants to prove business necessity.<sup>93</sup> The statute explicitly requires both business necessity and job relatedness. The mandate that an employer demonstrate job relatedness arguably tightens the business necessity standard by demanding that a practice be necessary for the job at issue.<sup>94</sup> If a practice such as requiring a diploma merely serves the function of making employees appear to be well educated to outsiders, but is not essential to performing a job, then the 1991 Act arguably prohibits that type of practice.<sup>95</sup>

Another possible interpretation is that the 1991 Act makes it easier for defendants to prove business necessity because the statute uses the term "consistent with" business necessity.<sup>96</sup> While the 1991

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87. See Grover, *supra* note 69, at 396-97.

88. See Lye, *supra* note 57, at 348-53.

89. See *Bradley v. Pizzaco of Neb.*, 7 F.3d 795, 797-99 (8th Cir. 1993) (holding 1991 Act places burden of showing "compelling need" regarding business necessity on defendant); *Nash v. Consolidated City of Jacksonville*, 895 F. Supp. 1536, 1545 (M.D. Fla. 1995) (holding that 1991 Act places burden of showing "sufficiently compelling" business purpose on defendant in Title VII case), *aff'd*, 85 F.3d 643 (11th Cir. 1996); see also Lye, *supra* note 57, at 349-50.

90. See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 & n.5 (11th Cir. 1993) (holding that 1991 Act places burden of showing "demonstrabl[e] necessity" regarding business necessity on defendant in Title VII case); see also Lye, *supra* note 57, at 350-51.

91. See *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 593 (D.R.I. 1996) (stating that, to prove business necessity under 1991 Civil Rights Act, the defendant must prove "that the challenged practice is reasonably necessary to achieve an important business objective"), *aff'd*, 110 F.3d 2 (1st Cir. 1997); see also Mahoney, *supra* note 56, at 455-58 (arguing most courts since 1991 have followed *Wards Cove*'s approach to what is a "legitimate business justification"); *id.* at 472-73 (agreeing with *Donnelly*'s relaxed "reasonably necessary" interpretation of business necessity); Lye, *supra* note 57, at 351-52.

92. See *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259, 321-22 (N.D. Cal. 1992); see also Lye, *supra* note 57, at 352-53.

93. See Grover, *supra* note 69, at 396-97.

94. See *id.*

95. See *id.*

96. See *supra* note 91.

Act clearly placed the burden of persuasion in proving business necessity on defendants, some courts have suggested that the *Wards Cove* and *Watson* decisions' more relaxed approach as to what constitutes a legitimate business justification remains valid.<sup>97</sup> Accordingly, in *Donnelly v. Rhode Island Board of Governors for Higher Education*, the United States District Court of Rhode Island held that a Title VII defendant must prove that a "challenged practice is *reasonably necessary* to achieve an important business objective."<sup>98</sup>

## 2. Types of Evidence that Constitute a Valid Business Justification

Title VII does not specify what type of evidence might constitute a valid business justification for a challenged practice.<sup>99</sup> A relaxed approach to proving business necessity is consistent with earlier Title VII cases in which courts have allowed a defendant to introduce evidence of significant cost savings, efficiency gains, or safety considerations as justification for either business practices or decisions having disparate impacts.<sup>100</sup> In both *Wards Cove* and the earlier *Watson* plurality decision, the Supreme Court stated that "[f]actors such as the cost or other burdens" of alternative practices are legitimate justifications for disparate impacts.<sup>101</sup> Furthermore, the Supreme Court and lower courts in some cases have recognized

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97. See *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601 n.6 (1st Cir. 1995) (concluding that *Wards Cove* remains good law except for portions explicitly rejected by 1991 Civil Rights Act); see also Mahoney, *supra* note 56, at 455-58 & n.198, 472-73 (arguing most courts since 1991 have followed *Wards Cove*'s approach to what denotes a "legitimate business justification").

98. 929 F. Supp. 583, 593 (D.R.I. 1996) (emphasis added), *aff'd*, 110 F.3d 2 (1st Cir. 1997); see also Mahoney, *supra* note 56, at 472-73 (applauding the careful analysis of *Donnelly*'s relaxed "reasonably necessary" interpretation of business necessity).

99. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion) (stating that employers are not required to introduce formal validation studies showing that their criteria actually predict on the job performance); see also Mahoney, *supra* note 56, at 475.

100. See *Watson*, 487 U.S. at 998 (permitting defendant to present evidence of cost and other burdens in assessing whether plaintiff's proposed "less-discriminatory" alternatives meet defendant's legitimate business goals); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979) (finding that safety and cost savings justify disparate impacts in Title VII case); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 570-71 (1978) (same); Brodin, *supra* note 79, at 344-57 (citing cases). But see Brodin, *supra* note 79, at 353-54 & n.203 (criticizing cost-based defenses); Grover, *supra* note 69, at 398 n.40; Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621, 1624-26 (1993) [hereinafter Note, *Less Discriminatory Alternatives*] (contending that courts should reject cost based defenses in disparate impact litigation).

101. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989) (quoting *Watson*, 487 U.S. at 998).

defendants' concerns about safety as justifying disparate impacts on employment decisions.<sup>102</sup>

If courts adopt a strict necessity approach to proving business necessity, defendants would have a greater burden in trying to use cost, efficiency or safety justifications. A strict necessity approach would be similar to Title VII cases involving disparate treatment of women and intentional gender discrimination, where the Supreme Court has generally rejected the defense of increased cost or reproductive safety when raised as a bona fide occupational justification for either not hiring women or for requiring them to contribute more to a pension because they live longer than men.<sup>103</sup>

### 3. Title VI Prohibits Unjustified Disparate Impacts

The EPA's Title VI regulations prohibit recipients from engaging in any practices that cause discriminatory effects.<sup>104</sup> In Title VI decisions involving other agencies, however, courts have generally interpreted similar regulations to allow recipients to present a defense of business or educational necessity as a justification for practices causing disparate impacts.<sup>105</sup> I argue, in Part V.B.1, to limit, but not eliminate, the ability of Title VI recipients to present such defenses, by requiring them to adopt a less discriminatory alternative unless it would cost significantly more or would be much less efficient or safe.

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102. See *Beazer*, 440 U.S. at 587 n.31 (finding that safety concerns justify disparate impacts in Title VII case); *Dothard v. Rawlinson*, 433 U.S. 321, 332-36 (1977) (same); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119-21 (11th Cir. 1993) (same).

103. See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197-211 (1991) (rejecting cost and safety as justification for not hiring women to lead exposed positions because of risks to any potential fetus); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-18 & n.32 (1978); see also *Grover*, *supra* note 69, at 398 n.40; Note, *Less Discriminatory Alternatives*, *supra* note 100, at 1624-26.

104. See *supra* notes 32-35 and accompanying text.

105. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1412-13 (11th Cir. 1993); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417-18 (11th Cir. 1985); *NAACP v. Wilmington Med. Ctr., Inc.*, 657 F.2d 1322, 1334 (3d Cir. 1981) (en banc) (stating that "challenged practice must not only affect disproportionately, it must do so unnecessarily"); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 127 (S.D. Ohio 1984) ("Defendants are not *per se* prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification."); *Been*, *Equity Issues*, *supra* note 59, § 25D.04[3][g], at 88 n.87; *Fisher*, *supra* note 13, at 321; *Sonn*, *supra* note 77, at 1598.

*D. Plaintiff's Demonstration of Alternative Sites*

Under Title VII, if a defendant presents a legitimate justification for its behavior, the plaintiff bears the ultimate burdens of production and persuasion to demonstrate either that the defendant's justification is actually a pretext for a discriminatory purpose, or that the defendant has refused to utilize an "alternative employment practice" that would achieve its legitimate goals with less discriminatory harm.<sup>106</sup> The 1991 Civil Rights Act codified the rule that the plaintiff has the burden of demonstrating the existence of alternative employment practices, and also specifies that a plaintiff may prevail only if the defendant employer "refuses to adopt such alternative employment practice."<sup>107</sup>

Title VII law is less clear about the degree to which a plaintiff must establish that an alternative is equally effective in addressing the defendant's legitimate business needs.<sup>108</sup> In 1989, the Supreme Court in *Wards Cove* followed *Watson* and held that plaintiffs must prove that a less discriminatory alternative is equally effective: "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals."<sup>109</sup> While the 1991 Act clearly rejected *Wards Cove's* holding that plaintiffs had the ultimate burden of persuasion on the issue of business necessity, the statute did not clearly reject that decision's holding that plaintiffs must prove that a less discriminatory alternative is equally effective. The 1991 Civil Rights Act appeared to reject *Wards Cove's* approach to the issue of alternative selection practices by stating that Title VII law on that issue would return to what it had been one day prior to the Supreme Court's decision. Unlike the issue of burden of proof for business necessity for which only prior *Supreme Court* decisions were allowed to define the law, the 1991 Act left standing as precedent prior *lower court* decisions for defining the plaintiff's burden for establishing suitable

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106. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1997); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (stating that, once the defendant presents a legitimate justification for its behavior, the plaintiff has the burden of showing that "other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'" (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973))); *Fitzpatrick*, 2 F.3d at 1117-19; see also *Mahoney*, *supra* note 56, at 483-84.

107. § 2000e-2(k)(1)(A)(ii); *Mahoney*, *supra* note 56, at 484.

108. See *Mahoney*, *supra* note 56, at 486-88.

109. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion)).

alternatives, including many decisions that had followed the same equally effective standard for alternatives as *Wards Cove* and *Watson*.<sup>110</sup> Several recent cases have continued to follow *Wards Cove*'s requirement that plaintiffs prove that an alternative would be equally effective, would have less disproportionate effect and would not cost significantly more.<sup>111</sup> Other cases have employed the possibly different standard that a plaintiff must demonstrate that a less discriminatory alternative is "comparably effective."<sup>112</sup>

V. EPA'S "INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS":  
PLACING THE BURDEN OF PROOF ON PLAINTIFFS

As discussed above,<sup>113</sup> the EPA issued the Interim Guidance to help the agency assess such complaints.<sup>114</sup> Many commentators have criticized the Interim Guidance because it only vaguely addresses critical terms, such as what constitutes a "disparate impact."<sup>115</sup> Most commentators, however, have failed to examine other important definitions in the Interim Guidance, including the extent to which mitigation measures may compensate for disparate impacts, and the circumstances under which an alternative should be considered "equally effective."

I propose, in Part V.B, four major ways to improve the Interim Guidance.<sup>116</sup> First, the EPA should place the burden on the recipient to demonstrate that no less discriminatory alternative exists that would meet the applicant's reasonable business needs. Second, the EPA should require the recipient to establish that any proposed mitigation measures will actually reduce any risks from the proposed facility to permissible levels, and to examine whether such mitigation measures

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110. See § 2000e-(2)(k)(1); see also Mahoney, *supra* note 56, at 486 n.298 (stating that the 1991 Act reinstates only Supreme Court decisions prior to *Wards Cove* on burden of proof for business necessity, but reinstates all court decisions prior to *Wards Cove* on defining alternatives).

111. See *York v. AT&T*, 95 F.3d 948, 955 (10th Cir. 1996); *MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (11th Cir. 1991) (quoting *Wards Cove*, 490 U.S. at 661); Mahoney, *supra* note 56, at 486-89.

112. See, e.g., *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118-19 (11th Cir. 1993) (requiring the plaintiff to show that a less discriminatory, comparably effective alternative exists). Part V.C.1.a will discuss the standard under Title VI for establishing that suitable less discriminatory alternatives exist. See *infra* Part V.C.1.a.

113. See *supra* note 5 and accompanying text.

114. See EPA, INTERIM GUIDANCE, *supra* note 5, at 20.

115. See *supra* note 6 and accompanying text.

116. The EPA can emphasize that it will be less likely to find Title VI violations if a recipient has adopted such procedures.



could be used at alternative sites that could meet the applicant's reasonable business needs with less discriminatory impacts. Third, the EPA itself should furnish technical assistance and technical assistance grants to Title VI complainants, or require recipients to do so. Finally, the EPA should strongly encourage recipients to adopt procedures to encourage early participation by affected populations, and especially minority groups, to avoid controversies that lead to Title VI challenges.

*A. Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*

*1. The EPA Issues the Interim Guidance and Promises to Revise It*

Public commentary on the Interim Guidance has generally been negative. Most commentators agree that the Interim Guidance only vaguely defines crucial terms such as "disparate impacts."<sup>117</sup> Furthermore, many state and local regulators and industry groups have asked the EPA to rescind the Interim Guidance because they fear that strict enforcement will discourage industry from building new industrial facilities and creating jobs in minority areas.<sup>118</sup> Congressional Republicans in the House of Representatives have enacted legislation placing a moratorium on the agency from accepting new Title VI complaints until it issues a final Title VI guidance and held hearings to pressure the EPA to either rescind or modify the Interim Guidance to make it less stringent and to allow industry greater freedom to develop in minority areas.<sup>119</sup> Many

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117. See Jeffrey B. Gracer, *Taking Environmental Justice Claims Seriously*, 28 ENVTL. L. REP. (News & Analysis) 10,373, 10,375 (1998); *Pollution in Minority and Inner-City Neighborhoods: Hearings Before the House Subcomm. on Oversight and Investigations*, 105th Cong., Aug. 6, 1998, available in 1998 WL 12763021 (testimony of Michael Hogan, New Jersey Dept. of Environmental Protection, criticizing Interim Guidance for failing to define "disparate impact," "community," or "mitigation"); *Pollution in Minority and Inner-City Neighborhoods: Hearings Before the House Subcomm. on Oversight and Investigations*, 105th Cong., Aug. 6, 1998, available in 1998 WL 12763097 (testimony of Barry McBee, Chairman of Texas Natural Resource Conservation Commission, stating that Texas shares concerns of other states that there are problems with Interim Guidance); *supra* notes 5-6 and accompanying text.

118. See *Environmental Council of States Resolution on EPA Interim Guidance for Investigating Permit Challenges Approved March 26, 1998*, 59 Daily Env't Rep. (BNA) E-1 (Mar. 27, 1998); *Environmental Justice: U.S. Conference of Mayors Calls on EPA to Suspend Guidance on Civil Rights*, 29 Env't Rep. (BNA) 469, 469 (June 26, 1998) [hereinafter *Conference of Mayors*].

119. In October 1998, Congress enacted and President Clinton reluctantly signed an appropriations bill that contains a rider prohibiting the EPA from accepting new Title VI complaints after the date of its enactment until the agency issues a finalized guidance on such complaints; however, the legislation does not affect about 15 existing Title VI complaints.

environmentalists, civil rights groups and minority members of Congress, however, have cautiously defended the Interim Guidance as a first step toward more stringent enforcement of the statute.<sup>120</sup>

Because of broad public criticism, the EPA has promised to revise the Interim Guidance and issue a final Interim Guidance in 1999.<sup>121</sup> Both the EPA's advisory committee on Title VI and its independent Science Advisory Board (SAB) will make recommendations on how to improve the Interim Guidance before the agency takes final action.<sup>122</sup>

## 2. Three Trouble Areas: Disparate Impacts, Mitigation, and Alternatives

There are three major problems with the Interim Guidance. First, it does not adequately explain how the agency will measure the amount and harmfulness of pollution and decide which populations will be affected by a facility, in determining whether granting a permit will cause significant disparate impacts. In particular, the agency fails to provide a clear methodology for measuring the cumulative burdens of all facilities impacting an affected population

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See Veteran Affairs and HUD Appropriations Act, Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Cindy Skrzycki, *The Regulators: With EPA as Judge*, WASH. POST, Oct. 23, 1998, at F01 (stating appropriations bill bars EPA from accepting new Title VI complaints until agency amends its policies); Bill Walsh, *Law Puts EPA Bias Rule on Hold: Industry Targets Racism Probes*, NEW ORLEANS TIMES-PICAYUNE, Oct. 23, 1998, at A8 (same); see also EPA Will Limit Scope of Environmental Justice Investigations, ENVTL. POL'Y ALERT, Dec. 2, 1998, at 7 (reporting Representative Tom Bliley's staff is investigating development of EPA's Title VI policy).

120. See EPA Will Limit Scope, *supra* note 119, at 7 (reporting Congressional Black Caucus favors EPA's Title VI policy). But see David Mastid, *Caucus Opposes EPA Rule: Rule Linking Pollution, Civil Rights 'Worst of Both Worlds,' One Says*, DETROIT NEWS, Dec. 4, 1998, at B1 (reporting National Black Caucus of State Legislators opposes EPA's Title VI policy because it is too weak to protect minorities, but vague enough to stop job creation in minority areas).

121. See *Pollution in Minority and Inner-City Neighborhoods: Hearings Before the House Subcomm. on Oversight and Investigations*, 105th Cong., Aug. 6, 1998 (testimony of Anne Goode, Director of Civil Rights, U.S. EPA); Connolly, *supra* note 44, at 658; Cheryl Hogue, *Draft Revision of Guidance for Processing Rights Complaints Expected by Mid-1999*, 29 Env't Rep. (BNA) 1807, 1807 (Jan. 15, 1999) (reporting EPA will likely issue a draft revision of its Interim Guidance on Title VI complaints by mid-1999); Hogue, *Permits Have Remained Valid*, *supra* note 44, at A-9.

122. See Connolly, *supra* note 44, at 658; Hogue, *Permits Have Remained Valid*, *supra* note 44, at A-9; Cheryl Hogue, *SAB Recommends Steps for EPA in Analyses of Disproportionate Impacts*, 29 Env't Rep. (BNA) 1310, 1310-11 (Oct. 30, 1998) [hereinafter Hogue, *SAB Recommends Steps*] (stating Science Advisory Board proposes that EPA conduct disproportionate impact analysis in a step-by-step fashion); Amy Porter, *Environmental Justice: Agency Relying on Advisory Committee to Face State Title VI Guidance Concerns*, 28 Env't Rep. (BNA) 2690, 2690 (Apr. 17, 1998).

group. Second, the Interim Guidance does not explain when and to what extent mitigation measures may offset any disparate impacts. Third, the Interim Guidance does not specify whether complainants or recipients have the burden of proving that the recipient failed to select a less discriminatory alternative and does not clarify what is an "equally effective" alternative.

a. Measuring Disparate Impacts

The Interim Guidance does not adequately explain how the agency will measure the amount and harmfulness of pollution, in order to decide which populations will be affected by a facility. First, the Interim Guidance gives the agency considerable wiggle room by indicating that the agency may use several different techniques in assessing disparate impacts and then reach a final evaluation based on the "totality of circumstances that each case presents."<sup>123</sup> The Interim Guidance does specify that the agency will usually undertake a five step process in assessing whether a disparate impact exists.<sup>124</sup> The key to the five steps is identifying the "most affected population groups" and facilities within the scope of the agency's cumulative pollution burden analysis.<sup>125</sup> The Interim Guidance states that the agency will usually examine not just the facility applying for a new or renewed permit, but will evaluate the cumulative burden of both existing and proposed facilities on "affected populations."<sup>126</sup> The EPA is more likely to find that disparate impacts exist if there are already many polluting facilities in an area.<sup>127</sup>

For the purposes of this Article, the crucial point is that a cumulative burden analysis, which examines all the proposed and existing facilities in a given area, is far more complex than simply measuring the impact of a single facility. Not surprisingly, a state official has strongly argued that the EPA should examine only the

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123. EPA, INTERIM GUIDANCE, *supra* note 5, at 9.

124. *See id.* at 9-11. First, the agency must define the population groups that are most greatly affected by a proposed or existing facility. Second, the agency conducts a demographic study of the most affected population groups. Third, the EPA must define which facilities and populations are within the scope of its cumulative pollution burden analysis. Fourth, the agency analyzes whether there are any disparate impacts by comparing the racial or ethnic composition within the affected populations to alternative areas that could have served as the site for the facility. Finally, the agency evaluates the statistical significance of any disparities. *See id.*

125. *See id.*

126. *See id.* at 9-11 & nn.12-13.

127. *See id.* at 10 n.13.

emissions resulting from the permit under challenge.<sup>128</sup> That official contends that existing emissions data is irrelevant in deciding whether disparities result from the particular permitting decision at issue.<sup>129</sup> Environmentalists and civil rights advocates would usually prefer to perform a cumulative burdens analysis because such an approach is probably more likely to demonstrate disparities than looking at emissions from a single facility applying for a permit. Nonetheless, the result still depends on how the EPA defines the relevant population groups and facilities in an analysis.

It is possible that the final Title VI interim guidance will provide better and clearer definitions of crucial terms, including disparate impacts, affected populations, and cumulative burdens.<sup>130</sup> The SAB has already recommended that the EPA examine not just whether disparities exist between different population groups, but whether the group at greater risk is exposed to an unacceptable level of risk.<sup>131</sup>

This Article predicts that, while the EPA may improve its definition of disparate impacts, affected populations, and cumulative burdens, the agency will not be able to develop a single, easy method for measuring any of these terms because there are too many complex variables. No definition can avoid the very complexity of defining disparate impacts, of defining and measuring the cumulative burdens of pollution, and of assessing the appropriate demographic populations.<sup>132</sup> As discussed in Part II, studies have reached different results about whether minority groups are disproportionately located near industrial or disposal facilities because some studies, for instance, have used census tracts as the unit of measurement, while others have used zip code areas.<sup>133</sup>

It is crucial that both recipients and complainants have the resources and technical expertise to challenge agency data, because

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128. See Cheryl Hogue, *Environmental Justice: Consider Only Emissions Due to Permit Under Challenge*, Louisiana Official Says, 173 Daily Env't Rep. (BNA) A-3 (Sept. 8, 1998) [hereinafter Hogue, *Consider Only Emissions*] (discussing comments of Bliss Higgins of the Louisiana Department of Environmental Quality).

129. See *id.*

130. See *supra* note 122 and accompanying text.

131. See Cheryl Hogue, *Environmental Justice: Advisers Recommending Some Changes in Methods for Title VI Complaint Analysis*, 173 Daily Env't Rep. (BNA) A-3 (Sept. 8, 1998); Hogue, *SAB Recommends Steps*, *supra* note 122, at 1311 (reporting Science Advisory Board recommends EPA should determine the risk to all populations around a facility, minority or not, before conducting a disproportionate impact analysis).

132. See generally Mank, *Environmental Justice*, *supra* note 9, at 343 n.59, 390-92 & n.373 (discussing how use of different definitions of subpopulations or geographical areas can dramatically affect research results); Mohai, *supra* note 11, *passim*; Zimmerman, *supra* note 11, at 665-69 (same).

133. See *supra* notes 9-12 and accompanying text.

one cannot assume that its demographic or pollution information is accurate or complete. The EPA or recipient agencies should provide technical assistance and funding to complainants so that affected populations can understand the complex technical issues involved in most Title VI environmental justice cases.<sup>134</sup>

b. Mitigation

If the EPA concludes that the recipient's action will result in disparate impacts, the recipient agency that awarded the permit may attempt to rebut the EPA's findings or contend that its action is justified by the proposal's net benefits; however, the EPA encourages measures that directly or indirectly mitigate any harms from such disparate impacts as the primary approach to addressing Title VI violations.<sup>135</sup> The EPA does not define when direct mitigation measures or indirect "supplemental mitigation projects" are appropriate to redress such harms, except to suggest that recipients consult with the agency.<sup>136</sup>

Civil rights groups are generally opposed to the EPA's policy of allowing mitigation measures to offset harms from disparate impacts, because they usually want to eliminate such impacts rather than to either reduce them or authorize the agency to count indirect benefits from supplemental environmental projects as compensation for such harms.<sup>137</sup> In Part V.B.2, I will demonstrate that the Interim Guidance fails to provide guarantees that recipients or permit applicants will actually implement promised mitigation measures. I will also examine the Interim Guidance's requirement that the recipient determine whether mitigation measures can serve as "less discriminatory alternatives."<sup>138</sup>

c. Less Discriminatory Alternatives

The Interim Guidance requires recipients to select a less discriminatory alternative if it is "equally effective" in addressing the permit applicant's goals, but fails to address how to evaluate alternatives, or which party has the burden of proof to establish the

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134. See *infra* Part V.B.3.

135. See EPA, INTERIM GUIDANCE, *supra* note 5, at 5, 11-12.

136. See *id.* at 11-12.

137. See Angela M. Baggetta, *Environmental Justice: Black Caucus, EPA to Meet on Shintech; Dispute May Be Test Case on Title VI Suits*, 139 Daily Env't Rep. (BNA) A-1 (July 21, 1998); Cole & Moore, *supra* note 120, at 14A.

138. See EPA, INTERIM GUIDANCE, *supra* note 5, at 12.

existence or nonexistence of alternatives.<sup>139</sup> The recipient should have the primary burden of production and proof to establish that a less discriminatory alternative does *not* exist, but a complainant may have a responsibility in some cases to present a less discriminatory alternative that was not reasonably apparent to the recipient.<sup>140</sup>

*B. Improving Title VI: Require Recipients to Identify Less Discriminatory Alternatives, Implement Mitigation Measures, and Provide for Public Participation, with the EPA to Provide Technical Assistance*

The EPA should implement four major changes to improve the Interim Guidance.<sup>141</sup> First, the Interim Guidance should place the burden on the recipient to demonstrate that there are no less discriminatory alternatives that meet the applicant's reasonable business needs. Second, the EPA should require the recipient to establish that any mitigation measures will reduce any risks to surrounding populations, including minority groups protected by Title VI, to permissible levels and to examine whether such mitigation measures could be used at less discriminatory alternatives that meet the applicant's reasonable business needs. Third, the EPA or recipient should provide technical assistance to Title VI complainants, and should also provide technical assistance grants so that complainants can hire their own technical experts. Finally, recipients should adopt procedures to encourage early participation by affected populations, especially minority groups, to avoid controversies that lead to Title VI challenges.

1. Proving That There Are No Less Discriminatory Alternatives

Title VI cases have inappropriately followed Title VII law in placing the burdens of production and proof on plaintiffs to demonstrate that a less discriminatory alternative exists.<sup>142</sup> In Title VI cases, if a defendant offers a legitimate nondiscriminatory business or educational justification for its actions, most courts have not required the defendant to consider alternative proposals with less disparate impact. Instead, courts have placed the burden on the plaintiff to demonstrate that a defendant failed to adopt an alternative

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139. See generally *id.*; Gracer, *supra* note 117, at 10,375.

140. See *infra* Part V.B.1.

141. See *infra* Part V.C.

142. See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); Colopy, *supra* note 19, at 161-62 & nn.163-66; Hampton, *supra* note 60, at 553.

practice with less discriminatory effect that would have met the defendant's legitimate business objectives.<sup>143</sup> According to Title VI case law, if a defendant *does* present evidence that it chose the least discriminatory alternative, the plaintiff must demonstrate that the defendant in fact did not do so.<sup>144</sup> Title VI case law suggests that a plaintiff must present a concrete alternative, rather than merely speculate that such an alternative might exist.<sup>145</sup>

Some commentators have argued that importing Title VII's restrictive evidentiary standards into Title VI cases is unnecessary and even contrary to the spirit of the latter statute because Title VII applies to the private labor market, where there is a presumption of employment at will.<sup>146</sup> Title VI pertains only to those parties who voluntarily accept federal aid.<sup>147</sup> Furthermore, Title VII explicitly acknowledges that defendants have affirmative defenses that may justify disparate impacts and that employers do not have to hire either women or minorities to precisely reflect their percentage of the population.<sup>148</sup>

There is an even stronger argument that Title VII should not serve as the evidentiary model for Title VI in addressing the question of less discriminatory alternatives. Title VII cases have emphasized that it is appropriate to place the burden on plaintiffs to demonstrate the existence of less discriminatory alternatives because placing an affirmative burden on defendants to prove that there is no less discriminatory alternative would interfere too much with private labor markets. "Because the courts are 'generally less competent than employers to restructure business practice,' the courts should be

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143. See generally *Elston*, 997 F.2d at 1407; *NAACP v. Wilmington Med. Ctr., Inc.*, 657 F.2d 1322, 1336 (3d Cir. 1981); *Bryan v. Koch*, 627 F.2d 612, 618-19 (2d Cir. 1980); *Colopy*, *supra* note 19, at 161-63 & n.163; *Hampton*, *supra* note 60, at 531, 553; see also *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 128 (S.D. Ohio 1984) (questioning but not deciding the plaintiff's assertion that defendant had duty under Title VI to discuss alternatives with less disparate impact).

144. See *Wilmington Med. Ctr.*, 657 F.2d at 1336-37 (requiring plaintiffs to demonstrate that feasible, less discriminatory alternatives exist if defendant provides reasonable justification for its actions, and suggesting that district court's "stringent standard" of requiring defendant to produce evidence that it had chosen least discriminatory alternative goes beyond Title VI's standard); *Colopy*, *supra* note 19, at 161-62 n.163.

145. See *Coalition of Concerned Citizens*, 608 F. Supp. at 128 (stating that plaintiff must present concrete, reasonable alternative sites); *Been*, *Equity Issues*, *supra* note 59, § 25D.04[3][g][iii], at 98-100 (arguing that environmental justice plaintiffs in Title VI actions should be prepared to demonstrate availability of alternative sites); *Fisher*, *supra* note 13, at 326-28 (same); *Hammer*, *supra* note 26, at 708-09 (same).

146. See *Watson*, *supra* note 30, at 971-73.

147. See *Fisher*, *supra* note 13, at 320; *Sonn*, *supra* note 77, at 1596 n.92; *Watson*, *supra* note 30, at 971-73.

148. See 42 U.S.C. § 2000e-2(j) (1997).

cautious in requiring that an employer adopt [alternative] practices recommended by the plaintiff in such a context.”<sup>149</sup> However, as Title VI recipients usually have greater expertise than complainants and have voluntarily accepted federal assistance, it is appropriate to place at least a limited burden on recipients to show no less discriminatory alternatives exist without interfering with recipient’s legitimate policymaking discretion.

Instead of following Title VII and VI case law, the EPA should place a limited burden of production and proof on the recipient permitting agency, and indirectly on the permit applicant, to demonstrate that there are no less discriminatory alternatives that meet the applicant’s reasonable business needs.<sup>150</sup> Furthermore, the Interim Guidance’s requirement that an alternative be “equally effective” makes it too easy for a permitting agency and permittee to use minor advantages to prefer their proposal to a reasonably effective alternative.<sup>151</sup> Thus, the EPA should simply require that an alternative is “comparably effective” or reasonably similar in meeting any legitimate business needs of the permit applicant. On the other hand, it is more difficult in the context of Title VI siting challenges to limit cost or safety factors than it is in the case of Title VII claims alleging intentional gender discrimination. Accordingly, the defendant should be able to reject alternative sites that are significantly more expensive or less safe than the proposed site.

a. The Interim Guidance Is Unclear

The Interim Guidance does not clearly specify whether the complainant has the burden of proving that less discriminatory alternatives exist or whether the recipient must show that such alternatives do not exist. The Interim Guidance simply states that “a justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists.”<sup>152</sup>

At least one commentator has suggested that the Interim Guidance violates Title VI case law by improperly placing the burden on the defendant recipient to demonstrate that no less discriminatory

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149. *Stutts v. Sears, Roebuck & Co.*, 855 F. Supp. 1574, 1580 (N.D. Ala. 1994) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978)); Mahoney, *supra* note 56, at 488.

150. See generally *Watson*, *supra* note 30, at 977 (arguing that in Title VI cases involving health care discrimination, “health care defendant[s] should bear the risk of non-persuasion on both the important, legitimate business objective and the less discriminatory alternatives”); *Hampton*, *supra* note 60, at 553.

151. See EPA, INTERIM GUIDANCE, *supra* note 5, at 12.

152. *Id.*



alternative exists rather than to simply provide a legitimate business justification for a decision.<sup>153</sup> In addition, while Title VI case law requires a plaintiff to show that a less discriminatory alternative will serve the defendant's legitimate business interests, the Interim Guidance arguably does not require a complainant to establish that such an alternative would reasonably meet the defendant's appropriate needs.<sup>154</sup>

On the other hand, the Interim Guidance states that an alternative must be "equally effective" in relation to the proposed facility.<sup>155</sup> The "equally effective" standard arguably places the burden of proof on the complainant to demonstrate that any alternatives it proffers are equally as good as the challenged proposal.

When it promulgates its final Title VI interim guidance, the EPA should clearly specify the extent to which either the complainant or recipient has the burden of production or proof as to whether a less discriminatory alternative exists. Furthermore, EPA should not follow Title VI and VII case law, which places the burdens of production and proof on the plaintiff to establish that a less discriminatory alternative exists and would reasonably meet the defendant's legitimate business goals, and should instead place those burdens on the recipient.

b. Defendant's Burden to Demonstrate No Less Discriminatory Alternatives

The recipient permitting agency and, indirectly, the permit applicant, should have a limited burden of production and the ultimate burden of proof to demonstrate that there are no less discriminatory alternatives. The proposal goes beyond existing Title VI case law, but the EPA has the authority under section 602 to promulgate implementing regulations that go beyond section 601, and has already done so by adopting a disparate impact standard rather than requiring proof of discriminatory intent.<sup>156</sup> Recipient agencies and permittees generally have greater resources and expertise than complainants to investigate alternative sites.<sup>157</sup> In addition, it is appropriate to place the burden of examining

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153. See Gracer, *supra* note 117, at 10,375.

154. See *id.*

155. See *supra* note 139 and accompanying text.

156. See *supra* notes 33-35 and accompanying text.

157. See generally *NAACP v. Wilmington Med. Ctr., Inc.*, 657 F.2d 1322, 1355 (3d Cir. 1981) (Gibbons, J., concurring in part and dissenting in part) (arguing that defendant health care organizations generally have more expertise than plaintiffs to formulate less discriminatory alternatives regarding the location of health care facilities); *Watson*, *supra* note 30, at 977 (same); *Hampton*, *supra* note 60, at 553 (same).

alternatives on the recipient, because it has benefited from an EPA grant that requires it not to engage in actions that cause disparate impacts.<sup>158</sup> Furthermore, the EPA's administrative process provides few rights for complainants to participate in the investigation of a complaint, but provides substantial appeal rights to recipients found guilty of a violation. Therefore, it is reasonable to place the ultimate burdens of production and proof in that process on the recipient, even if it arguably would not be fair to do so in a lawsuit in which the defendant does not enjoy such procedural protections.

In many cases, the National Environmental Policy Act (NEPA),<sup>159</sup> state mini-NEPAs, or substantive environmental statutes require the agency to consider alternative sites or plans.<sup>160</sup> Building upon this NEPA precedent, this Article proposes to interpret Title VI to require the recipient to adopt the least discriminatory alternative that reasonably serves the legitimate business needs of the recipient or permit applicant.<sup>161</sup>

Even though the recipient would have the burdens of production and proof to demonstrate that no less discriminatory alternative than the chosen site exists, the EPA should try to limit the cost of those burdens as much as possible without harming the legitimate concerns of the complainant. Conducting such investigations of alternative sites is less burdensome than it might seem at first because recipient agencies and permit applicants are often required by the recipient's permitting and siting rules to compile a list of several potential sites and to rank them before making a final selection.<sup>162</sup> While plaintiffs could use the recipient's list to point out alternatives, the recipient and permit applicant are likely to understand better the strengths and

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158. See Watson, *supra* note 30, at 977 (arguing that burden of proof should be on recipient because it has accepted federal grant money).

159. 42 U.S.C. §§ 4321-4347 (1997).

160. See § 4332(2)(C)(iii); 40 C.F.R. § 1502.14 (1997); 33 C.F.R. § 230.10 (1998); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 293 n.358 (1997) (listing thirteen states and Puerto Rico as having state statutes or regulations based on NEPA that require agency to consider alternatives).

161. See 40 C.F.R. § 1505.2 (1997) (requiring that final ROD (record of decision) discuss why proposal was selected in preference to alternatives); Kaswan, *supra* note 160, at 294; Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 577 (1997) (determining that NEPA requires identification of alternatives, but does not require agency to select least environmentally damaging alternative); see also MINN. STAT. ANN. § 116D.04(6) (West 1997) (requiring state to adopt feasible and prudent alternative that is less environmentally destructive).

162. See Mank, *Environmental Justice*, *supra* note 9, at 345-51 (discussing various state siting processes); Colopy, *supra* note 19, at 163 n.169 (determining that some defendants in siting cases have chosen from a list of potential sites).

weaknesses of potential sites because they have compiled the list; therefore, the burden should be on the recipient to explain whether other sites on the list would have less discriminatory impact and to what extent other sites could meet the applicant's legitimate business needs. Accordingly, recipients should have the burden of production and proof to consider alternative sites.

While the burden of production and proof should be on recipient agencies to examine alternative sites, the EPA could place reasonable limits on the range of alternative sites that a recipient must consider. In Title VI cases involving the siting of public facilities, courts have been reluctant to consider alternatives that require substantial modification of the defendant's goals because of the risk that the judiciary would exceed its constitutional role by inappropriately substituting its policy choices in place of those of elected and appointed officials.<sup>163</sup> The EPA is not bound by the same Article III limitations as courts in enforcing Title VI, but the broad criticism of the Interim Guidance by state and local officials across the nation suggests that the EPA must be cautious about interfering too much with the policy choices of state or local recipient agencies, or face strong criticism that its policies are hampering economic development.<sup>164</sup>

As a practical political matter, the EPA's Title VI policy probably should follow case law in limiting the range of alternatives that a recipient must consider. For example, a recipient would not have to consider alternatives that would involve a significant change in the permit applicant's legitimate business goals. On the other hand, as will be explained below, the appropriate question should be whether an alternative is "comparably effective" rather than whether it is "equally effective."<sup>165</sup> A recipient should not use minor differences to reject a less discriminatory alternative that can meet its legitimate business needs.

In addition, a recipient should not have to disprove every possible alternative, but only reasonably apparent alternatives.<sup>166</sup> Such a

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163. See *Bryan v. Koch*, 627 F.2d 612, 619 (2d Cir. 1980) (warning, in Title VI case, that court should require plaintiffs to focus on comparable alternatives and not consider alternatives based on significantly different policy choices because of danger court would substitute its policy judgments for elected and appointed officials); *Been, Equity Issues*, *supra* note 59, § 25D.04[3][g][iii], at 99-100.

164. See *supra* notes 118-119 and accompanying text.

165. See *infra*.

166. See generally *Watson*, *supra* note 30, at 977 (arguing that in Title VI cases involving health care discrimination, health care defendants should have a duty to examine reasonable alternatives, but not to "disprove every conceivable alternative").

limitation is consistent with Title VII's requirement that a defendant may be held liable only if it refuses to implement a less discriminatory alternative.<sup>167</sup> A recipient should not be held in violation of Title VI if it did not know or should have known about the existence of a less discriminatory alternative.

In NEPA cases, if a complainant simply submits a long "laundry list" of conceivable alternatives, a court may apply a "rule of reason" and refuse to require an agency to conduct an expensive or intensive investigation of every possible alternative.<sup>168</sup> Applying such a "rule of reason," the Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, concluded that even though agencies have a duty under NEPA to examine alternatives, agencies are not required to examine every alternative raised; they may require an intervenor to show why an alternative merits further study.<sup>169</sup> The Nuclear Regulatory Commission had not required the complainants even to establish a *prima facie* case that an alternative was effective, but merely asked the complainant to make a sufficient showing that energy conservation and other suggested alternatives were worth further study and examination.<sup>170</sup> A majority of NEPA cases place the burden of proof on the plaintiff to demonstrate that an agency's Environmental Impact Statement (EIS) is inadequate,<sup>171</sup> and

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167. See *supra* notes 106-107 and accompanying text.

168. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 552-53 (1978) (concluding that, where complainant submitted long list of alternatives, including "energy conservation," agency did not have obligation to investigate every single alternative raised, but only to explore relatively apparent alternatives or alternatives that complainant had explained in sufficient detail); *Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1027 (4th Cir. 1975) (applying "rule of reason" standard to limit agency's consideration of alternatives in preparing Environmental Impact Statement (EIS)); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836-38 (D.C. Cir. 1972) (stating that agency's discussion of alternatives in an EIS was governed by rule of reason); Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, Question 16, 46 Fed. Reg. 18,026, 18,037 (1981) (stating that if "a very large number of alternatives" are potentially available, agency may limit consideration to a "reasonable number" as long as agency evaluates an adequate range of alternatives); DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* § 9.05[2], [3] (1992 & Supp. 1998) (discussing *Morton* and *Vermont Yankee*); *id.* § 10.09[4] n.36 (listing cases applying "rule of reason").

169. 435 U.S. at 552-54 (stating that petitioner has duty under NEPA and basic principles of administrative law to raise issues before agency rather than engage in trial by ambush and that agency only has duty to explore relatively apparent alternatives).

170. See *id.*; MANDELKER, *supra* note 168, § 9.05[3] (discussing *Vermont Yankee*).

171. See MANDELKER, *supra* note 168, § 4.09[8] n.143 (listing cases).

some courts have required plaintiffs to demonstrate that their proposed alternatives are reasonable and feasible.<sup>172</sup>

Arguably, cases such as *Vermont Yankee* place too heavy a burden on environmental groups to introduce evidence that challenges an agency's findings or methodology. Environmental groups' resources to investigate alternatives are usually far more limited than those of agencies. The proposal<sup>173</sup> to provide technical assistance grants to such groups would at best provide only very limited resources for them to examine alternatives. On the other hand, complainants should not simply submit a long list of alternatives to an agency and then refuse to participate in the internal hearing process, as did the petitioners in *Vermont Yankee*.<sup>174</sup>

Because recipient state or local permitting agencies generally possess greater resources and expertise than complainants, the EPA should not place the burden of proof on complainants to demonstrate that a proposed alternative is equally or even comparably effective to the proposal. However, the EPA may require that a complainant demonstrate that during the public comment period of the permitting process it presented a proposed less discriminatory alternative that the recipient unreasonably failed to investigate further or that the recipient failed to adequately consider reasonably apparent alternative sites. Once a complainant has sufficiently identified a less discriminatory alternative and provided a plausible suggestion for why it *might* be reasonably effective, then the burden of production and proof would shift back to the recipient to explain why that alternative is less acceptable than the proposed facility. The ultimate burden of production and proof should be on the recipient, because it usually has greater expertise than most complainants, and because it has benefited from a federal grant.<sup>175</sup> Nevertheless, a complainant should, to the extent possible, raise specific alternatives so that a recipient can efficiently respond to those charges without engaging in an unnecessarily expensive and open ended investigation.

c. "Equally Effective" Alternatives

Title VII cases have generally adopted *Wards Cove's* standard that plaintiffs must prove that an alternative would be equally

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172. See *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 128 (S.D. Ohio 1984) (quoting *Citizens Committee Against Interstate Route 675 v. Lewis*, 542 F. Supp. 496, 522 (S.D. Ohio 1982)); Colopy, *supra* note 19, at 163 n.169.

173. See *infra* Part V.B.3.

174. See *Vermont Yankee*, 435 U.S. at 552-53.

175. See *supra* note 158 and accompanying text.

effective, would have less disproportionate effect, and would not cost significantly more.<sup>176</sup> At least one recent Title VII case has required the plaintiff to show that a less discriminatory alternative is “comparably effective.”<sup>177</sup> Title VI case law is even less clear about whether a plaintiff must prove that a less discriminatory alternative is “equally effective”<sup>178</sup> or only “that there exists a comparably effective alternative practice which would result in less disproportionality.”<sup>179</sup>

The EPA has adopted the “equally effective” standard in its Interim Guidance, but does not explain when an alternative should be considered “equally effective.”<sup>180</sup> The “equally effective” standard makes it too easy for defendants to use minor differences to reject reasonably good sites. Instead, the EPA should require a recipient to adopt a less discriminatory alternative that is “comparably effective.”<sup>181</sup> The EPA should not allow defendants to impose criteria that artificially exclude reasonably effective alternative sites in areas with lower minority populations. In particular, the EPA should require a recipient to implement a less discriminatory alternative unless the recipient can demonstrate that it is significantly more expensive, less efficient, or less safe than a more discriminatory challenged proposal.

#### d. Cost as a Factor

A difficult issue concerns the extent to which a recipient agency may use cost as a justification to exclude less discriminatory alternatives on the grounds that the proposed site is less expensive than any alternative site. Following *Wards Cove*, Title VII cases generally require plaintiffs to demonstrate that an alternative is “equally effective” by showing that a less discriminatory alternative

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176. See *York v. AT&T*, 95 F.3d 948, 955 (10th Cir. 1996); *MacPherson v. University of Montevallo*, 922 F.2d 766, 771 (11th Cir. 1991) (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989)); *Mahoney*, *supra* note 56, at 486-89.

177. See *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1121 (11th Cir. 1993).

178. See *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

179. *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

180. See EPA, INTERIM GUIDANCE, *supra* note 5, at 12.

181. See *Elston*, 997 F.2d at 1407 (stating that alternative must be “comparably effective”); *Coalition of Concerned Citizens*, 608 F. Supp. at 128 (stating that plaintiff must present concrete alternative sites); see also *Been*, *Equity Issues*, *supra* note 59, § 25D.04[3][g][iii], at 98-100 (arguing that environmental justice plaintiff in Title VI action should be prepared to demonstrate availability of alternative sites); *Fisher*, *supra* note 13, at 321 (same); *Hammer*, *supra* note 26, at 708-09 (same).

would not cost significantly more than the challenged policy.<sup>182</sup> Similarly, in Title VI cases challenging allegedly discriminatory hospital closings or relocations, courts have allowed defendants to demonstrate that their proposals would save more money than less discriminatory alternatives.<sup>183</sup>

If a low-income minority group lives in an area with significantly lower land prices, a recipient may argue that such lower land prices are a substantial business reason for selecting a site and, accordingly, that any disparate impacts on minority groups are justified.<sup>184</sup> Because minority groups, on average, have lower incomes than whites and, as a result, often live in areas with lower land prices, allowing recipients and developers to use lower costs as a justification may place many minorities at risk.<sup>185</sup>

Some commentators have argued that only extraordinary costs that would put an employer out of business should be a defense in Title VII employment cases; society should require employers to bear the costs associated with achieving racial or gender equality unless these costs are so great that a business could not operate if it, for instance, hires female workers.<sup>186</sup> In Title VII cases alleging disparate treatment or intentional discrimination, the Supreme Court has generally rejected the defense of increased cost when raised as a bona fide occupational qualification for not hiring women or charging them larger pension contributions, unless such costs would be so great that

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182. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 661 (1989) (stating that "[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals") (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 998 (1988) (plurality opinion)); *EEOC v. Joe's Stone Crab, Inc.*, 969 F. Supp. 727, 740 (S.D. Fla. 1997) (citing *Wards Cove*, 490 U.S. at 661); *Rudder v. District of Columbia*, 890 F. Supp. 23, 46 (D.D.C. 1995) (same), *aff'd*, 99 F.3d 448 (D.C. Cir. 1996); *Stutts v. Sears, Roebuck & Co.*, 855 F. Supp. 1574, 1581 (N.D. Ala. 1994) (same); Mahoney, *supra* note 56, at 488-89 & n.305 (citing and quoting cases).

183. See *NAACP v. Wilmington Med. Ctr., Inc.*, 491 F. Supp. 290, 316, 339-40, 342 (D. Del. 1980) (finding that cost justified hospital relocation in Title VI case), *aff'd*, 657 F.2d 1322 (3d Cir. 1981) (en banc); *Bryan v. Koch*, 492 F. Supp. 212, 221-22 (S.D.N.Y. 1980) (same), *aff'd*, 627 F.2d 612 (2d Cir. 1980); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g][ii][A], at 92-94 (citing cases); *Watson*, *supra* note 30, at 966-69; see also *Jackson v. Conway*, 476 F. Supp. 896, 905 (E.D. Mo. 1979) (denying preliminary injunction against closing and consolidation of hospital services based on cost savings of \$7 million per year in Title VI case), *aff'd*, 620 F.2d 680 (8th Cir. 1980).

184. See *Centner et al.*, *supra* note 67, at 140.

185. See generally *Been, Market Dynamics*, *supra* note 12, at 1392-97 (suggesting that environmental disparities are often largely the result of income rather than primarily caused by race).

186. See *Grover*, *supra* note 69, at 398 n.40; Note, *Less Discriminatory Alternatives*, *supra* note 100, at 1629-31.

an industry could not bear them.<sup>187</sup> On the other hand, in Title VII cases not involving intentional sex discrimination, courts generally allow significant cost differences to serve as a justification for discriminatory practices.<sup>188</sup>

While prohibiting defendants from raising costs as a defense unless those costs are of extraordinary magnitude would provide greater protection to minorities by forcing recipients to use more expensive alternative sites, such a policy might discourage any economic development in minority areas, including redevelopment of brownfields. Instead of prohibiting cost defenses, the EPA should simply place the burden on the recipient rather than the complainant to demonstrate that any alternative site would be significantly more expensive and that the added cost would make it substantially more difficult to achieve the permit applicant's legitimate business goals.

It would be more difficult to disallow totally cost as a justification in Title VI siting cases than Title VII employment discrimination actions. Courts can require all employers in an industry to bear, for instance, the costs of sex equality.<sup>189</sup> Such cost equalization is more difficult in the context of environmental siting because it is impractical to close existing facilities that have already benefited from lower land costs. Furthermore, because land prices vary significantly from location to location, it is difficult to say when discrimination may have influenced the value of land or the number of minorities in an area. A blanket rule that developers cannot locate where land is cheap if there are significant numbers of minorities in an area would discourage economic development or redevelopment in minority areas. Many mayors have criticized the Interim Guidance because it might discourage development of brownfields, and they would certainly oppose an explicit policy against development in low-cost minority areas.<sup>190</sup>

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187. See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197-211 (1991) (rejecting increased cost and reproductive safety as justifications for not hiring women); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716-18 & n.32 (1978) (holding under Title VII that increased cost of providing pensions to women does not justify sex discrimination); Note, *Less Discriminatory Alternatives*, *supra* note 100, at 1628-31.

188. See *supra* notes 182-183 and accompanying text.

189. See Note, *Less Discriminatory Alternatives*, *supra* note 100, at 1633-34 ("Provided that courts impose restructuring on all employers equally, no disadvantage will attach to any individual business."). However, it may be more difficult for industries involved in international competition to pass on costs, but Congress has rejected that argument by extending employment discrimination law extraterritorially. See *id.* at 1634; Civil Rights Act of 1991, § 109, 42 U.S.C. § 2000e.

190. See *Conference of Mayors*, *supra* note 118, at 469.



Even if it is not possible to prohibit totally the consideration of cost as a justification for selecting a site in a heavily minority area, an improved interim guidance on Title VI could require the permitting agency and permittee to demonstrate that the selected site is significantly less expensive than any less discriminatory alternative.<sup>191</sup> Some Title VII cases have suggested that *Wards Cove's* "equally effective" standard means that a plaintiff must show that an alternative is not significantly more expensive, not that the costs must be exactly the same.<sup>192</sup> If costs are roughly the same, the EPA should not allow recipients to use insignificant cost differences as a pretext to justify the selection of a site for unspoken discriminatory reasons, including that the minority community may have less political clout to block a proposal than a nonminority community. However, if there are some cost differences between a minority site and a less discriminatory alternative, it may be difficult to challenge a permittee's assertion that such a difference would affect its ability to compete even if that claim is a pretext for hidden discriminatory motives. Still, placing the burden on the permitting agency and permittee to show that the selected site is significantly less expensive than any less discriminatory alternative should discourage blatantly discriminatory efforts to pick minority communities because they are politically weaker than comparable alternative areas.

e. Safety as a Justification

In Title VII cases, the Supreme Court has usually allowed safety or efficiency considerations to serve as legitimate business justifications for discriminatory practices,<sup>193</sup> but has rejected the defense of reproductive safety when raised as a bona fide occupational qualification for not hiring women.<sup>194</sup> Courts in Title VI cases involving hospital consolidations or relocations have allowed defendants to justify moves to areas with lower minority populations because the defendant's previously fragmented facilities contributed to serious problems in the quality of care, and

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191. See *Watson*, *supra* note 30, at 977 (arguing that "[a] more costly less discriminatory alternative is acceptable as long as the cost differential is not too substantial").

192. See *Nash v. Consolidated City of Jacksonville*, 895 F. Supp. 1536, 1553 (M.D. Fla. 1995) (ruling that the plaintiff failed to present alternatives that did not involve "greatly increased costs"); *Mahoney*, *supra* note 56, at 488-89 & n.305 (citing and quoting cases); see also *Allen v. District of Columbia*, 812 F. Supp. 1239, 1245 (D.D.C. 1993) (stating that less discriminatory alternative must be "both possible and practical").

193. See *supra* notes 101-102 and accompanying text.

194. See *supra* notes 103 and accompanying text.

consolidation or relocation would significantly improve care.<sup>195</sup> Similarly, Title VI defendants in environmental siting cases are likely to argue that safety, geology, or transportation convenience justify the selection of a site in a minority area.<sup>196</sup>

The EPA should place the burden on the recipient to show that less discriminatory sites would be significantly less safe or efficient than the challenged proposal. While it is more difficult to reject safety as a justification in Title VI siting cases than in Title VII employment discrimination actions, the EPA should ensure that comparable less discriminatory sites do not exist that would provide similar advantages. Women who are capable of bearing children should have the option of working in industries where there are unavoidable reproductive risks, even if the employer reasonably fears increased medical costs or liability risks. The Supreme Court has recognized reproductive choice as an important value, and excluding women from such jobs would significantly hinder their employment opportunities in violation of Title VII, as amended by the Pregnancy Discrimination Act.<sup>197</sup>

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195. See *NAACP v. Wilmington Med. Ctr., Inc.*, 491 F. Supp. 290, 316, 341-42 (D. Del. 1980) (finding, in Title VI case, that quality and efficiency of consolidation justified hospital relocation and consolidation where hospital could show the change was "essential" to maintain high quality care and to avoid losing accreditation because previously fragmented facilities contributed to serious problems in the quality of care), *aff'd*, 657 F.2d 1322 (3d Cir. 1981) (en banc); *United States v. Bexar County*, 484 F. Supp. 855, 859 (W.D. Tex. 1980) (stating that transportation problems caused by relocation would be outweighed by quality concerns); *Jackson v. Conway*, 476 F. Supp. 896, 904-905 (E.D. Mo. 1979) (finding that efficiency, including occupancy rates, and quality concerns, such as number of life support units and medical school access, justified relocation), *aff'd*, 620 F.2d 680 (8th Cir. 1980); Been, *Equity Issues*, *supra* note 59, § 25D.04[3][g][ii][A], at 92-94 (citing cases); Watson, *supra* note 30, at 966-69; Hampton, *supra* note 60, at 536-42.

196. See, e.g., Joan Z. Bernstein, *The Siting of Commercial Waste Facilities: An Evolution of Community Land Use Decisions*, 1 KAN. J.L. & PUB. POL'Y 83, 84 (1991) ("The waste industry's criteria for identifying attractive sites has evolved over the last several decades, from considerations that were primarily financial to considerations that reflect the priority of protecting human health and the environment."); Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 FORDHAM URB. L.J. 689, 697 (1994) (arguing that WMX's Emelle landfill in predominantly African-American Sumter County, Alabama was chosen because of good transportation, its aridity, sparse population, and "most importantly, [because it] was located atop the 'Selma chalk formation'"); Jane Seigler, *Environmental Justice: An Industry Perspective*, 5 MD. J. CONTEMP. LEGAL ISSUES 59 (1993-94) (same). But see Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 729 (1993) [hereinafter Foster, *Race(ial) Matters*] (criticizing use of race-neutral grounds by private industry and suggesting they may be cover for racism); Mank, *Environmental Justice*, *supra* note 9, at 398-424 (arguing that current siting schemes may under protect the most vulnerable populations living near a proposed facility).

197. See *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197-207 (1991) (rejecting reproductive safety as justification for not hiring women).

On the other hand, if a developer legitimately demonstrates that a minority site is safer than any less discriminatory alternative because, for example, there are unique geological formations in the minority area that inhibit spills from reaching underground aquifers, then such a justification should be allowed.<sup>198</sup> There is no reason to believe that minority areas are disproportionately safer than majority areas. Indeed, to the extent that discriminatory siting has occurred in the past in areas such as Louisiana's "cancer alley,"<sup>199</sup> a policy focusing on safety should benefit minority groups more than hurt them. Nevertheless, the permitting agency and permittee should bear the burden of establishing that safety concerns are not a pretext to justify the selection of a site for unspoken discriminatory reasons.

## 2. Requiring Legitimate Mitigation Measures

The Congressional Black Caucus and environmental justice advocates have argued that the Interim Guidance is inconsistent with Title VI case law because it allows mitigation measures to be used to justify a project that would otherwise pose unacceptable risks to groups protected under the statute.<sup>200</sup> While their fear that mitigation measures will be used to legitimate otherwise unacceptable projects raises genuine concerns, a total prohibition on considering mitigation measures is probably unrealistic. Instead, the permitting agency and permittee should bear the burden of establishing that any mitigation measures used to reduce disparate impacts to an acceptable level will in fact work, and will reduce any risks to surrounding populations, including minority groups protected by Title VI, to permissible levels. Moreover, the permitting agency and permittee should have the burden of examining whether such mitigation measures could be

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198. See Mank, *Environmental Justice*, *supra* note 9, at 398-99 (discussing industry's argument that Emelle Landfill was located in heavily minority Sumter County, Alabama, not because of race, but because Selma chalk formation provides 700-foot barrier from the nearest aquifer); McDermott, *supra* note 196, at 697 (same). But see Foster, *Race(ial) Matters*, *supra* note 196, at 729 (suggesting that private industry's use of race-neutral grounds may be cover for racism).

199. The term "cancer alley" refers to the approximately 85-mile corridor from Baton Rouge to New Orleans, Louisiana, which contains numerous petrochemical facilities and a large minority population. See Saleem, *supra* note 25, at 230 n.80 (discussing high level of pollution and substantial minority population in St. James Parish, Louisiana). But see CHRISTOPHER FOREMAN, *THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE* 75-76 (1998) (observing that there are high levels of pollution and substantial minority populations in the so-called "cancer alley" area, but arguing that a recent study did not find elevated cancer rates in that area).

200. See Baggetta, *supra* note 137, at A-1.

used in conjunction with less discriminatory alternatives that meet the applicant's reasonable business needs.

It could be argued that, if a project would pose unacceptable risks to any population group, including minority and ethnic groups protected by Title VI, mitigation measures should not be used to justify such a project, because there are usually no guarantees that such mitigation will work. On the other hand, if there are effective mitigation measures available, such as the placement of a buffer zone around a polluting facility to keep any harmful effects from surrounding population<sup>201</sup> or the provision of enhanced fire fighting equipment to address any increased risk of fires,<sup>202</sup> then it is unreasonable to simply ignore actions that reduce risks.

In other areas of environmental law, it is common to consider mitigative procedures. The NEPA requires federal agencies, state or local governments that receive substantial federal financial assistance for a project, or certain federal permit applicants to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment,"<sup>203</sup> or to issue a finding of no significant impact (FONSI).<sup>204</sup> NEPA does not require that agencies or private applicants actually implement mitigation measures, but the lead agency must discuss how such measures could minimize any environmental impacts.<sup>205</sup>

201. See Bradford C. Mank, *Preventing Bhopal: "Dead Zones" and Toxic Death Risk Index Taxes*, 53 OHIO ST. L.J. 761, 776-78 (1992).

202. Bradford C. Mank, *The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?*, 19 B.C. ENVTL. AFF. L. REV. 239, 272-74, 276 (1991-92).

203. 42 U.S.C. § 4332(2)(C) (1997). To determine whether a proposed action is a "major Federal action[] significantly affecting the quality of the human environment" requiring an EIS, agencies draft an Environmental Assessment (EA) that examines the need for the project, considers alternatives to the proposal, discusses the impacts of the proposal and any alternatives, and may discuss mitigation measures. See Valerie M. Fogleman, *Environmental Impact Statements*, in 1 ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW § 1.07 (Michael Gerrard ed. 1997); Johnson, *supra* note 161, at 570. If a permit application by a private party requires an EIS, the permitting agency must draft the EIS, but may collaborate with the applicant. See Fogleman, *supra*, § 1.09[2][c], at 60. A state agency, however, may draft an EIS when the proposed action is federally funded. See *id.*

204. See 40 C.F.R. § 1508.13 (1997); MANDELKER, *supra* note 168, § 8.08[2], [3] (discussing cases upholding or rejecting a finding of no significant impact).

205. See 40 C.F.R. § 1502.16(h) (1997); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989); MANDELKER, *supra* note 168, § 8.08[10] n.76. A few states require agencies to implement feasible mitigation measures or alternatives. See CAL. PUB. RES. CODE § 21002.1(b) (Deering 1996) (requiring state agencies to mitigate or avoid significant environmental impacts if "feasible"); MINN. STAT. ANN. § 116D.04(6) (West 1997) (requiring state to adopt feasible and prudent alternative that is less environmentally

Courts have held and the White House Council on Environmental Quality has suggested that agencies, sometimes working in collaboration with private applicants, may avoid preparing an EIS by mitigating the impacts of their projects in the planning stages and then preparing a mitigated FONSI that relies on the mitigation measures to bring any adverse effects from the project below the level of "significance" triggering an EIS.<sup>206</sup> Also, in an attempt to achieve a national goal of "no net loss" of wetlands, the Army Corps of Engineers frequently requires mitigation measures as a condition for obtaining a wetlands permit.<sup>207</sup>

While some environmentalists, as a matter of principle, would not allow mitigation measures to justify an otherwise unacceptable project, it does not make sense to ignore the fact that *effective* mitigation measures can reduce or eliminate a project's impacts. Environmentalists have, however, raised two important questions about when it is appropriate to use mitigation measures to justify a project. First, mitigation measures should be enforceable, rather than mere promises made to be broken. There has been some question about whether and to what extent courts will enforce mitigation promises, by either government or private project sponsors, that are used to justify a mitigated FONSI, especially once the sponsor completes the project.<sup>208</sup> The United States Court of Appeals for the Ninth Circuit has held that mitigation promises by third parties not responsible for an environmental assessment "must be more than mere

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destructive); N.Y. ENVTL. CONSERV. LAW § 8-0109(1) (McKinney 1997) (requiring mitigation to maximum extent practicable); Johnson, *supra* note 161, at 597-99.

206. See *Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs*, 87 F.3d 1242, 1247-48 (11th Cir. 1996); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1327-29 (9th Cir. 1992); *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 681-83 (D.C. Cir. 1982); Council on Environmental Quality, *supra* note 168, at Question 39, 18,037; MANDELKER, *supra* note 168, § 8.08[10]; Fogleman, *supra* note 203, § 1.07[3]; Albert I. Herson, *Project Mitigation Revisited: Most Courts Approve Findings of No Significant Impact Justified by Mitigation*, 13 ECOLOGY L.Q. 51, 69 (1986); Johnson, *supra* note 161, at 576; Thomas O. McGarity, *Judicial Enforcement of NEPA-Inspired Promises*, 20 ENVTL. L. 569, 577-91 (1990).

207. See 40 C.F.R. § 230.10(d) (1997) (requiring compensatory mitigation in appropriate circumstances); 33 C.F.R. § 320.4(r) (1998); Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9,211 (1990) [hereinafter Mitigation MOA]; see also *Friends of the Earth v. Hintz*, 800 F.2d 822, 837-38 (9th Cir. 1986) (upholding mitigation through off-site purchase of wetlands); MANDELKER, *supra* note 168, § 8.08[10]; Marc R. Bulson, *Off-Site Mitigation and the EIS Threshold: NEPA's Faulty Framework*, 41 WASH. U. J. URB. & CONTEMP. L. 101, 105-07 (1992).

208. See McGarity, *supra* note 206, at 580.

vague statements of good intentions.”<sup>209</sup> On the other hand, once a project is largely or wholly completed, a court may be reluctant to issue an injunction to prevent operation of a project unless the sponsor has “blatant[ly]” intended to violate NEPA and there is irreparable harm to the public interest that outweighs the benefits of the project.<sup>210</sup>

Second, one must consider the issue of how closely related to a project mitigation measures must be to be acceptable. For example, the Army Corps of Engineers prefers on-site or in-kind wetlands mitigation, but allows the use of off-site mitigation, including cash payments to large wetlands “banks.”<sup>211</sup> Environmentalists frequently argue that only mitigation measures directly related to a project should count because there is often a danger that off-site mitigation measures will not adequately compensate for a project’s impacts.<sup>212</sup> Most courts, however, have allowed agencies to use off-site mitigation measures to compensate for a project’s impacts.<sup>213</sup> The EPA has increasingly encouraged defendants owing civil penalties to consider supplemental environmental projects (SEPs) in lieu of paying monetary penalties to the United States Treasury.<sup>214</sup> Moreover, penalties in citizen suits have often included such projects.<sup>215</sup>

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209. *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982).

210. *See Richland Park Homeowners Ass’n, Inc. v. Pierce*, 671 F.2d 935, 942 (5th Cir. 1982) (holding that the plaintiffs’ NEPA claims were moot even though the agency failed to prepare special “environmental clearance” required by the agency’s own regulations because NEPA is forward-looking statute that does not apply when project is completed unless agency has committed a “blatant” NEPA violation and caused irreparable harm to public interest); McGarity, *supra* note 206, at 580-83.

211. *See* 40 C.F.R. § 230.10(d) (1997) (requiring compensatory mitigation in appropriate circumstances); President Clinton, Protecting America’s Wetlands: A Fair, Flexible and Effective Approach, 58 Fed. Reg. 47,718-722 (1994) (referring to U.S. Army Corps of Engineers guidance letter implementing President’s policy initiative that includes wetlands banking); Mitigation MOA, *supra* note 207, at 9,212; Michael G. Le Desma, Note, *A Sound of Thunder: Problems and Prospects in Wetland Mitigation Banking*, 19 COLUM. J. ENVTL. L. 497, 499-500 (1994); Jonathan Silverstein, Comment, *Taking Wetlands to the Bank: The Role of Wetland Mitigation Banking in a Comprehensive Approach to Wetlands Protection*, 22 B.C. ENVTL. AFF. L. REV. 129, 132-34 (1994).

212. *See Preservation Coalition*, 667 F.2d at 860, (holding that mitigation measures must be related to the project at issue and that general air pollution control requirements for automobiles did not count as mitigation for increased automobile traffic resulting from downtown center redevelopment project). *See generally* Bulson, *supra* note 207 (arguing that courts should apply a more stringent standard of review under NEPA when a agency uses off-site mitigation to justify a project).

213. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 343-44 (1989) (observing that EIS discussed several off-site mitigation options); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 366-67 (1989) (noting that EIS mitigated fish loss from dam through off-site hatchery); *Friends of the Earth v. Hintz*, 800 F.2d 822, 837-38 (9th Cir. 1986) (upholding mitigation through off-site purchase of wetlands).

214. *See* EPA, EPA Final Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796 (1998); Christopher D. Carey, *Negotiating Environmental Penalties: Guidance*

The Interim Guidance states that, if it is impracticable for a permittee to mitigate sufficiently the public health or environmental impacts of a proposal, the EPA will consider the benefits of "supplemental mitigation projects" (SMPs), along with project related mitigation efforts, in determining whether the recipient and permittee have adequately addressed the disparate impacts of a project and sufficiently compensated the affected community.<sup>216</sup> The Interim Guidance suggests that SMPs are attractive because they can address "concerns associated with the permitting of the facility raised by the complainant that cannot otherwise be redressed under Title VI (*i.e.*, because they are outside those considerations ordinarily entertained by the permitting authority)."<sup>217</sup> For instance, a developer that cannot sufficiently reduce air pollution impacts from a project might undertake a beneficial wetlands project. On the other hand, environmentalists are justifiably concerned that an unrelated supplemental mitigation project may not address the harms flowing from the project. If a supplemental project enhances biodiversity, but does nothing to reduce unacceptable human health effects from a project, then such mitigation should not count. While the guidelines should not prohibit all types of supplemental or off-site mitigation, the EPA should amend its supplemental mitigation proposal to require that any mitigation address similar health or environmental risks as those caused by the project. If toxic air pollution from a project increases the risk of, for instance, colon cancer, an appropriate supplemental project might reduce toxic water pollution that causes the same disease. In light of society's limited knowledge about causes and comparative risk of different diseases, the EPA should not allow a project to justify an unacceptable cancer risk, such as a one in one thousand increased risk of cancer, with a supplemental mitigation project that may reduce the incidence of an unrelated harm, such as neurological disease caused by lead poisoning. Furthermore, the EPA should be cautious about allowing pollution reductions in one

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on the Use of Supplemental Environmental Projects, 44 A.F. L. Rev. 1 (1998); Leslie J. Kaschak, Note, *Supplemental Environmental Projects: Evolution of a Policy*, 2 ENVTL. LAW. 465 (1996).

215. See 42 U.S.C. § 7413 (1997) (specifically authorizing supplemental environmental projects of up to \$100,000 under Clean Air Act); Quan B. Nghiem, Comment, *Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act*, 24 B.C. ENVTL. AFF. L. REV. 561, 562 n.6 (1997) (listing several decisions approving supplemental environmental project under the Clean Water Act).

216. See EPA, INTERIM GUIDANCE, *supra* note 5, at 11-12.

217. *Id.* at 12.

medium, such as water, substitute for increased pollution in another medium, such as the air.<sup>218</sup>

At the very least, permit applicants and permitting agencies should have the burden of demonstrating that any proffered mitigation measures will actually work and will reduce any health or environmental impacts of a proposal to acceptable levels. Industry and state or local permitting agencies would probably agree that proposed mitigation techniques ought to be made in good faith; it is difficult to argue that project sponsors and permitting agencies should use mitigation measures to justify a project if they have no real intention to carry out such protective techniques. Industry and state or local permitting agencies probably would oppose imposing sanctions if good faith mitigation proposals do not work as well in practice as predicted at the time of a permit application.

If it is impracticable to carry out proposed mitigation measures that were used to justify a project, the EPA ought to ensure that a permittee and the permitting agency take alternative steps that provide substantially equivalent protection, or that the permitting agency shut down a project if it poses unacceptable risks. The more difficult question is what to do when the mitigation measures are less effective than predicted, but the facility is marginally safe.

The Interim Guidance requires that the recipient determine whether mitigation measures can serve as "less discriminatory alternatives."<sup>219</sup> The Interim Guidance does not explain, however, whether this requirement applies only to the proposed site, or also to potential alternative sites. The EPA should explicitly require recipients to examine whether such mitigation measures could also be used at less discriminatory alternative sites that meet the applicant's reasonable business needs. If a proposed site that would otherwise pose unacceptable risks can be made safe through the use of mitigation measures, it is not unreasonable to ask whether those techniques might make a less discriminatory alternative site that meets the applicant's reasonable business needs acceptable as well. As a practical matter, the cost of evaluating the impact of mitigation measures might justify

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218. See generally Hornstein, *supra* note 68, at 584-616 (arguing that comparative risk analysis has many limitations); Mank, *Environmental Justice*, *supra* note 9, at 394-97 (same); Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 *ECOLOGY L.Q.* 1, 70-73 (1998) [hereinafter Mank, *Project XL*] (criticizing proposals for cross-media trading and emphasizing society's limited scientific knowledge about comparative harm of different diseases); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 *HARV. ENVTL. L. REV.* 103, 189-90 (1998) (same).

219. See EPA, *INTERIM GUIDANCE*, *supra* note 5, at 12.



focusing on a relatively small number of potentially less discriminatory alternative sites. If mitigation strategies can be used to justify siting a facility in a minority area, presumably the same techniques might make a majority area suitable for the facility.

### 3. Technical Assistance Grants

Furthermore, for environmental permitting decisions to have legitimacy in a democratic society, it is important that a permitting agency provide significant opportunities for public participation, rather than make decisions by administrative fiat.<sup>220</sup> If an agency simply provides opportunities for public comment, however, it may not reach disadvantaged groups.<sup>221</sup> Accordingly, the EPA should take affirmative steps to ensure broad participation by minority and low-income populations by providing technical assistance to Title VI complainants and should also provide technical assistance grants so that complainants can hire their own technical experts or require recipients to provide them. Under its section 602 regulations, the EPA cannot award damages to complainants<sup>222</sup> or provide attorneys fees.<sup>223</sup> Accordingly, there is no incentive for profit-motivated experts or attorneys to provide technical assistance. In other areas of environmental law, the EPA has provided technical assistance grants to environmental organizations; although these grants are often too small and the application process is so cumbersome for the average community organization that they need to hire experts to apply for a grant to hire such experts!<sup>224</sup>

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220. See Daniel J. Fiorino, *Environmental Risk and Democratic Process: A Critical Review*, 14 COLUM. J. ENVTL. L. 501, 523-30 (1989); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 831-32 (1998) [hereinafter Foster, *Justice from the Ground Up*]; Mank, *Environmental Justice*, *supra* note 9, at 370; Douglas R. Williams, *Environmental Law and Democratic Legitimacy*, 4 DUKE ENVTL. L. & POL'Y F. 1, 19-31 (1994).

221. See Deoohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671, 675-77 (1994); Mank, *Environmental Justice*, *supra* note 9, at 369.

222. See 40 C.F.R. § 7.130(a) (1997); Hammer, *supra* note 26, at 711.

223. See *North Carolina Dep't of Transp. v. Crest St. Council, Inc.*, 479 U.S. 6, 12-16 (1986) (stating that agencies cannot award attorneys fees to complainants even if an agency finds a violation, but successful plaintiffs who file a private lawsuit under Title VI may recover attorneys fees).

224. See Ferris, *supra* note 221, at 679-80; Mank, *Project XL*, *supra* note 217, at 78-79. See generally EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, SUPERFUND TECHNICAL ASSISTANCE GRANT HANDBOOK: APPLYING FOR YOUR GRANT (1993) (EPA 540-K-93-003) [hereinafter EPA, *APPLYING FOR YOUR GRANT*]; EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, SUPERFUND TECHNICAL ASSISTANCE GRANT HANDBOOK: THE APPLICATION FORMS WITH INSTRUCTIONS (1993) (EPA 540-K-93-004).

The EPA already provides grants to state, tribal, and local governments to help them comply with Title VI and to achieve environmental justice goals. In fiscal year 1998, the Office of Environmental Justice expected to award \$500,000 under the State and Tribal Environmental Justice Grants Program, with a maximum of \$100,000 per grant.<sup>225</sup> In addition, in fiscal year 1998, the Office of Environmental Justice expected to award \$3.5 million to local governments to establish pilot programs for its enhanced Environmental Monitoring for Public Access and Community Tracking (EMPACT) Grants Program that will likely include programs enhancing the ability of the public to identify pollution that has a disparate impact on minorities.<sup>226</sup>

Section 117(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) "provides for technical assistance grants of up to \$50,000 for any group or individual affected by a release or threatened release at any abandoned hazardous waste facility that is listed on the National Priorities List under the National Contingency Plan."<sup>227</sup> The EPA, however, has awarded relatively few grants under this statute, and by its own admission "the agency has made it difficult for local citizens or environmental groups to win these grants because of unnecessary 'restrictions, complexity, costs, and red tape.'"<sup>228</sup> For instance, community groups must ordinarily supply funds matching twenty percent of the total grant unless they obtain a

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225. See STEJ Grants Program Request for Applications Guidance FY 1998, 63 Fed. Reg. 13,666 (1998). The EPA also awards grants of up to \$300,000 each to universities that form partnerships with disadvantaged communities through its Community-University Partnership Grants Program. See EPA, Office of Environmental Justice and the Office of Civil Rights Solicitation Notice for Fiscal Year (FY) 1995; Environmental Justice Community/University Partnership Grants Program, 60 Fed. Reg. 14,281-14,282 (1995).

226. See EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL MONITORING AND COMMUNITY TRACKING (EMPACT) GRANTS PROGRAM (visited Nov. 22, 1998) <<http://es.epa.gov/oeca/oec/empact.html>>.

227. Mank, *Project XL*, *supra* note 217, at 78; see also 42 U.S.C. § 9617(e)(1997); 40 C.F.R. §§ 35.4000-35.4130 (1997). It is possible to seek a waiver of the \$50,000 limit for an initial grant, up to a \$100,000 limit per site, but only if a cleanup is unusually complex. See 40 C.F.R. § 35.4090(a)(2); EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, SUPERFUND TECHNICAL ASSISTANCE GRANT HANDBOOK: MANAGING YOUR GRANT 11-12 (1994) (EPA-K-93-006) [hereinafter EPA, MANAGING YOUR GRANT].

228. Mank, *Project XL*, *supra* note 217, at 78 (quoting 1989 Superfund Mgmt. Rev. at 5-16); accord 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES & SUBSTANCES § 8.9.C.3, 617-18 n.133 (1992) (same); see also Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 ECOLOGY L.Q. 173, 199 n.175 (1991) (discussing restrictions on TAG grants); James T. Hamilton & W. Kip Viscusi, *The Benefits and Costs of Regulatory Reforms for Superfund*, 16 STAN. ENVTL. L.J. 159, 180 (1997) ("[O]ur research indicates that minority communities are much less likely to receive [Superfund technical assistance] grants than other communities.") (footnote omitted).

waiver.<sup>229</sup> In addition, community organizations must meet a number of administrative requirements, including being an incorporated nonprofit organization, and file quarterly progress reports and yearly financial reports.<sup>230</sup> The agency evaluates grant applications based on a five criteria, weighted one hundred point scoring system, that includes: (1) the site's risk (thirty points), (2) the applicant's ability to represent the public (twenty points), (3) how the group plans to use its proposed technical advisor (twenty points), (4) the ability of the applicant to inform the public (twenty points), and (5) the economic or environmental threat the site poses to group members (ten points).<sup>231</sup> The agency does not give a lump sum grant to successful applicants, but instead reimburses them for their actual expenses.<sup>232</sup>

The EPA has also proposed to provide up to \$25,000 per project for technical assistance to stakeholders involved in its Project XL regulatory reform program.<sup>233</sup> These grants must be paid directly to the expert for specified assistance and may not be paid to individuals or groups of stakeholders.<sup>234</sup> The EPA's Project XL technical assistance grant proposal offers inadequate grants and unduly restricts in not allowing community organizations to hire their own experts to examine the safety of industry projects that propose to modify existing environmental regulations to achieve greater efficiency.<sup>235</sup>

There are special reasons for providing technical assistance to Title VI complainants because of the complexities of demonstrating disparate impacts. These complexities include defining the relevant area and "affected populations," the appropriate facilities, and the amount and harmfulness of pollution involves complex scientific

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229. See 40 C.F.R. §§ 35.4085(a) (1997) (mandating 20% matching fund requirement); *id.* § 35.4090(b) (setting forth waiver provision); EPA, APPLYING FOR YOUR GRANT, *supra* note 224, at 4-5.

230. See 40 C.F.R. § 35.4020(b)(1997) (requiring that TAG recipient be incorporated nonprofit organization); *id.* § 35.4110(a)-(b) (requiring quarterly progress and yearly financial reports); EPA, APPLYING FOR YOUR GRANT, *supra* note 224, at 3-4 (requiring applicant to be incorporated); EPA, MANAGING YOUR GRANT, *supra* note 229, at 7-8 (discussing quarterly and annual report requirements).

231. See *id.* § 35.4035(a)-(5) (listing five criteria); Mank, *Project XL*, *supra* note 217, at 78-79.

232. See 40 C.F.R. § 35.4080; Mank, *Project XL*, *supra* note 217, at 79.

233. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,872, 19,881 (1997); Mank, *Project XL*, *supra* note 217, at 68, 77-79 (criticizing EPA proposal for technical assistance grants for Project XL as inadequate).

234. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,881; Mank, *Project XL*, *supra* note 217, at 68, 77-79.

235. See Mank, *Project XL*, *supra* note 217, at 68, 77-79.

judgments.<sup>236</sup> Therefore, the permittee, the complainant, and the recipient permitting agency will want their own experts to present their side of how to interpret the facts of a case to EPA officials.

Even if the EPA's final Title VI interim guidance provides better definitions than the Interim Guidance, it is important for all participants in a Title VI environmental justice case to have access to experts who can discuss with the agency different possible interpretations of demographic and pollution data. While state or local permitting agencies and permit applicants may find it burdensome to employ the necessary experts in a Title VI case, the hardship on environmental justice complainants is likely to be even greater. Although a simple letter is sufficient to file a Title VI complaint with the EPA, a complainant may need technical experts to review the agency's proposed findings about demographic and pollution data.

In the controversial *Shintech* case, which involved a proposal to build a plastics factory in the heavily polluted and minority community of Convent, Louisiana, the EPA struggled to define which facilities and population groups should have been included in its disparate impact analysis.<sup>237</sup> The Louisiana environmental agency that was the target of the Title VI complaint argued that the EPA should have just studied the emissions resulting from the proposed Shintech permit under challenge.<sup>238</sup> According to the permit applicant, the complainants, and the EPA itself, the census and pollution data used by the agency in a draft report examining the Shintech proposal contained significant errors, omissions, and uncertainties.<sup>239</sup> Furthermore, the agency could have reached a different result if it examined population and pollution data from a one-mile radius around the proposed site rather than a four-mile radius. Evaluating the risk of a facility to surrounding populations was very difficult because

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236. See EPA, INTERIM GUIDANCE, *supra* note 5, at 9-11; *supra* note 132 and accompanying text.

237. See Hogue, *Consider Only Emissions*, *supra* note 128, at A-3 (discussing comments of Bliss Higgins of the Louisiana Department of Environmental Quality). Shintech just announced that it has abandoned the Convent site, but is proposing to build a smaller facility in nearby Plaquemine. See Traci Watson, *La. Town Successful in Stopping Plastics Plant*, USA TODAY, Sept. 18, 1998, at 7A. The EPA is suspending its investigation into the plant's impact, and may also suspend its Title VI investigation into Louisiana DEQ. See *id.*

238. See note 237 and accompanying text.

239. See Bruce Alpert, TIMES-PICAYUNE, June 15, 1998, at A1 (reporting that the EPA found census data within one mile of proposed Shintech facility to be unreliable, and also had difficulty measuring amount of pollution in four-mile area); Vicki Ferstel, *Data for EPA's Shintech Decision Confusing at Best*, ADVOCATE (Baton Rouge, La.), July 2, 1998, at 1B (reporting that Shintech found that fewer people lived within one mile of site than EPA data claimed).

different assumptions about the size of the area that was "most affected" and the harmfulness of the pollutants can lead to dramatically different results.<sup>240</sup>

Because complainants often cannot afford to hire necessary technical experts, the EPA ought to provide meaningful technical assistance grants, perhaps up to \$100,000 per complaint, to allow complainants to thoroughly investigate a complainant once the EPA concludes after a preliminary investigation that the complaint raises serious health issues. The primary problem with this proposal is finding the necessary funding. Ideally, the permittee should pay to provide the complainant with expert assistance. Permittees, however, would likely object to funding their opponents. The EPA could require that recipients provide funding, but the agency might have to increase its funding to recipients to enable them to provide such grants. As a practical matter, the EPA will probably have to provide funding for technical assistance grants. The political opposition to the Interim Guidance, however, suggests that there may be substantial opposition to any proposal that makes it easier for environmental justice groups to file Title VI complaints that can stymie proposed industrial projects. To overcome this opposition, it may be necessary to tie technical assistance grants to proposals for more collaboration among industry, recipients and the public.<sup>241</sup>

It would be better policy to allow the complainant to hire its own expert so it has the flexibility to pursue various possible leads, rather than adopt the EPA's Project XL requirement that the agency directly pay the expert for narrowly tailored assistance. However, the latter option would be better than no assistance at all. It is often hard to predict in advance exactly what type of technical assistance is available to investigate a complex case such as *Shintech*. Accordingly,

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240. See generally Mank, *Environmental Justice*, *supra* note 9, at 343 n.59, 390-92 & n.373 (discussing how use of different definitions of subpopulations or geographical areas can dramatically affect research results); Mohai, *supra* note 11, at 615 (same); Zimmerman, *supra* note 11, at 665-69 (same).

241. See *supra* Part V.B.4. Industry and state or local officials would likely strongly oppose EPA giving grants to Title VI complainants. In September 1998, the Detroit News criticized the EPA for providing a \$5,000 grant to a local community group, Flint-Genese United for Action, because a closely associated group, St. Francis Prayer Center, later filed a Title VI complaint against a proposed steel plant in Flint, Michigan. EPA argued that the grant was for development of a community demographic and pollution profile and did not pay for the group to file the complaint. See David Mastio, *EPA Aided Mill Workers: Flint Prayer Center Affiliated Gets \$5,000 from Agency to Lobby Local Officials*, DETROIT NEWS, Sept. 23, 1998, at A1; EPA: *Rogue Agency*, DETROIT NEWS, Sept. 24, 1998, at A8 (reporting editorial criticizing EPA's actions). But see *Letters: EPA Denies Bankrolling Flint Complaint*, DETROIT NEWS, Nov. 8, 1998, at D8 (printing a Letter to the Editor by David A. Ullrich, Acting Administrator, U.S. EPA Region V).

direct grants to complainants would allow them more freedom to select their experts and lines of inquiry.

Understandably, the EPA is nervous that a community organization might misuse or waste a grant, and thus prefers a more rigidly bureaucratic program where it closely monitors the exact work that an expert performs. Even the EPA has recognized, however, that its CERCLA TAG program has imposed too many complex rules on applicants who lack the resources and technical sophistication to anticipate every issue. Community groups should not need to hire an expert to prepare a grant request for technical assistance.

The EPA must strike a balance between making sure technical assistance grants are not wasted and using them to help community organizations participate more effectively in challenging projects that a preliminary investigation suggests are likely to cause disparate impacts to minority and ethnic groups protected by Title VI. The EPA needs to provide grants that are large enough to level the playing field to some extent, so that community groups can challenge industry experts. However, it is unlikely that community groups will even come close to matching the resources of industry. In addition, the EPA needs to allow enough flexibility in its TAG program to allow experts to pursue promising areas of inquiry if significant new evidence emerges. In theory, a group could submit a revised application to investigate additional areas, but it is very cumbersome for grant applicants to file a revised application every time new information suggests a slightly different avenue of investigation. Instead, the EPA should provide lump sum grants to qualified experts to pursue evidence that is reasonably relevant to an ongoing Title VI investigation.

There are several ways the EPA can ensure that TAG funds are not misused without adopting unduly restrictive rules. First, the EPA could provide such grants only if its preliminary investigation found probable cause that a violation has occurred. Second, the EPA could require that any expert must take an agency training course and be certified by the agency or another state or national accreditation board. Third, the EPA could monitor the use of these funds. Fourth, the EPA could require that it directly pay the expert and even choose the expert, although that may reduce the complainant's freedom to investigate promising leads. A technical assistance program for Title VI complainants would allow them to bring effective challenges against the permittee and recipient agency, which usually have far greater resources.

#### 4. Providing the Public with a Reasonable Opportunity to Raise Issues of Disparate Impacts

A recipient agency's permitting process should provide the public with a reasonable opportunity to raise claims of disparate impacts. It could be argued that it is sufficient that the public may file Title VI administrative complaints with the EPA even if the recipient agency has no internal provisions for addressing disparate impacts challenges. The EPA, however, has promulgated regulations under section 602 of Title VI that prohibit recipient agencies from engaging in practices creating discriminatory effects or locating a facility where it will have discriminatory effects, including state agencies granting environmental permits.<sup>242</sup> Furthermore, the EPA regulations mandate that state recipients maintain Title VI compliance programs addressing both discrimination by the state and by any beneficiaries of state-administered funds.<sup>243</sup> If a state or local recipient does not take at least some steps to provide the public with a reasonable opportunity to raise claims of disparate impacts, the recipient is arguably in violation of these provisions.

Both recipients and the EPA have an interest in minimizing the number of Title VI claims, because the investigation of such complaints is costly, time consuming, and often contentious. Several state officials have testified before Congress that they would prefer to resolve discrimination issues before minority individuals or groups file Title VI complaints.<sup>244</sup> The EPA has recognized that reducing the number of Title VI complaints is an important goal, and has specifically asked the agency's advisory committee on implementing Title VI to recommend changes in state or local permitting practices to resolve problems before they become the subject of complaints.<sup>245</sup>

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242. See 40 C.F.R. § 7.35(b) (1997) (prohibiting use of discriminatory program criteria); *id.* § 7.35(c) (prohibiting location of facility that has discriminatory effect).

243. See 28 C.F.R. § 42.410 (1998).

244. See Hogue, *Permits Have Remained Valid*, *supra* note 44, at A-9.

245. See *Environmental Justice: New EPA Advisory Committee to Address Rights Concerns on State, Local Permitting*, 28 Env't Rep. (BNA) 2441 (1998); *Pollution in Minority and Inner-City Neighborhoods: Hearings Before the House Subcomm. on Oversight and Investigations*, 105th Cong., (Aug. 6, 1998), available in 1998 WL 12763021 (testimony of Michael Hogan, New Jersey Dept. of Environmental Protection, stating that New Jersey is adopting "an inclusive collaborative process to address issues of environmental equity" and an "upfront/proactive environmental equity process" that allows local minority and low-income communities to have "input into the permitting process when it is most meaningful, before the permit is issued"); *Pollution in Minority and Inner-City Neighborhoods: Hearings Before the House Subcomm. on Oversight and Investigations*, 105th Cong., (Aug. 6, 1998), available in 1998 WL 12763097 (testimony of Barry McBee, Chairman of Texas Natural Resource Conservation Commission) (noting that Texas seeks to provide citizens with opportunity for early, meaningful input into permitting process).

A recipient is much more likely to avoid Title VI complaints if it requires community involvement and public participation early in the permitting process.<sup>246</sup> New Jersey and Texas state officials have testified before Congress that they have already created “three-legged” networks of government, business and minority communities to discuss the racial implications of siting decisions, and that they want to further develop these “up-front” processes to avoid discrimination problems.<sup>247</sup> These state officials want the EPA to approve such pre-licensing procedures so there would be a shield, or at least a presumption, that any Title VI complaint lacked substance if the state follows the approved process, rather than have the EPA conduct lengthy post-licensing reviews, as in the *Shintech* case.<sup>248</sup> The Environmental Council of States, representing forty-nine states and the District of Columbia, has created a working group to develop such principles, and the New Jersey Department of Environmental Protection has similar plans.<sup>249</sup> The more a recipient’s permitting process parallels the EPA’s Title VI criteria, the more likely a recipient will avoid engaging in discrimination that violates the EPA’s section 602 regulations.

Even if a state develops procedures to encourage public participation in the permitting process, there may still be serious questions about whether that process adequately addresses those most at risk, particularly vulnerable minority groups. Existing processes for creating community advisory boards for siting or permitting decisions often fail to guarantee that those at greatest risk will have representation.<sup>250</sup> There are possible solutions, such as granting more votes to those at greater risk, adopting cumulative or proportional voting schemes that allow all minority voters to cumulate their votes, or ranking candidates in preference to increase the odds of minority

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246. See Hogue, *Permits Have Remained Valid*, *supra* note 44, at A-9.

247. See *id.* at A-9; Joan McKinney, *Congressmen Want New Siting Rules*, *ADVOCATE* (Baton Rouge, La.), Aug. 9, 1998, at 17B.

248. See Hogue, *Permits Have Remained Valid*, *supra* note 44, at A-9; McKinney, *supra* note 247, at 17B.

249. See Hogue, *Permits Have Remained Valid*, *supra* note 44, at A-9. The Environmental Council of States has drafted an environmental justice principles paper which it will submit to state officials for a vote in October, 1998. See *State Officials Draft New Alternatives to EPA Environmental Justice Policy*, *ENVTL. POL’Y ALERT*, Aug. 26, 1998, at 30.

250. See Foster, *Justice from the Ground Up*, *supra* note 220, at 834-37 (arguing that citizen advisory committees may not adequately represent minorities); Mank, *Environmental Justice*, *supra* note 9, at 410-19 (arguing that community siting compensation committees may not adequately represent minorities or high-risk residents).



representation.<sup>251</sup> The EPA or the recipient could use technical assistance grants to educate minority or high-risk residents about a project and, accordingly, increase the odds that members of such groups will participate. Several federal agencies in their environmental justice strategies have established programs to educate the public, to reach minority groups that may not traditionally participate in agency permitting decisions, to translate documents in languages other than English where appropriate, and to write their environmental documents in plain language that is accessible to the general public.<sup>252</sup> The EPA should strongly encourage recipients to adopt similar programs.

If a state adopts effective and meaningful procedures encouraging early participation, the EPA should take such participation into account when reviewing a Title VI complaint. If a complainant participated in such a process, but did not raise an issue or present an alternative at that time, the complainant has a weaker claim that the recipient acted unreasonably. To insure effective participation, however, the EPA or recipients should provide technical assistance, and hopefully TAG grants, to community organizations early in the permitting process to identify problems before significant resources are invested in a site. In particular, any state process should examine whether less discriminatory alternatives exist.

## VI. CONCLUSION

The EPA's regulations provide few rights for complainants, but many protections to recipients that the agency finds have engaged in discriminatory practices. Also, there are substantial differences between Title VI's regulation of recipients who voluntarily accept federal aid and Title VII's prohibition of discriminatory actions by private employers. Accordingly, the EPA should not follow the burden of proof or affirmative defenses that apply to employment discrimination issues. Because recipients generally possess greater expertise and resources than complainants, it is appropriate to place a greater burden on recipients to justify their permit decisions. Recipients should bear the burden of establishing that no less discriminatory alternatives exist that can meet the applicant's

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251. See Mank, *Environmental Justice*, *supra* note 9, at 412-14 (proposing cumulative voting or Hare Single Transferable Vote proportional voting systems as ways to increase representation of minorities or high-risk residents on community siting compensation committees).

252. See Environmental Protection Agency, EPA-200-R-95-002, ENVIRONMENTAL JUSTICE STRATEGY (1995); Mank, *Executive Order 12,898*, *supra* note 22.

legitimate objectives, that they will actually implement proposed mitigation measures, and that no mitigation techniques exist that would allow a less discriminatory alternative to satisfy the applicant's genuine goals. Furthermore, the EPA or recipients should level the playing field by providing technical assistance and grants to Title VI complainants. Finally, recipients should adopt procedures encouraging early participation by affected populations, particularly minority groups, to avoid controversies that lead to Title VI challenges. If a recipient has effective procedures for public participation by a diverse group of citizens and provides reasonable technical assistance to such groups, the EPA should usually defer to its permitting decisions.

With these changes, state and local permitting agencies and permit applicants will finally have a strong incentive to avoid locating polluting facilities in minority areas if reasonably effective less discriminatory alternatives exist. These changes, however, should not discourage legitimate development projects that add significant economic value to minority communities. The proposed changes strike a reasonable balance between preventing disparate impacts that unduly harm minority communities and allowing development in impoverished minority areas. Developers can use effective mitigation measures and the promise of significant economic benefits to win approval for beneficial economic development projects in minority areas.

